AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 613.

SMITHSONIAN INSTITUTION AND MELVILLE W. FULLER, AS CHANCELLOR OF SAID SMITHSONIAN INSTITUTION, PLAINTIFFS IN ERROR,

vs.

GAMALIEL C. ST. JOHN, AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WALLACE C. ANDREWS, DECEASED, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

RECORD FILED NOVEMBER 28, 1902.
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(21,409.)

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Supreme Court of the United States.

No. 613, October Term, 1908.

SMITHSONIAN INSTITUTION and Another, Plaintiffs-in-Error,

against

GAMALIEL C. ST. JOHN, as Executor, etc., and Others, Defendants-in-Error.

It is stipulated by the parties that the following extracts from the transcript of the record filed herein contain that portion thereof which bears upon the Federal questions claimed by plaintiffs-in-error to be shown by said record and the same are to be printed for use on the hearing herein of any motion to dismiss or upon the merits, the parties not waiving the right to claim on the argument that certain parts so printed are not material.

Dated, November 23, 1908.

FRANK W. HACKETT,
EDMUND WETMORE,
Attorneys for Plaintiffs-in-Error.
W. S. JACKSON,
Attorney General of the State of New York.
HENRY M. EARLE,
Att'y for Edith A. Logan.
JAMES W. HAWES,
Att'y for St. John, as Exr., &c., Defendant in Error.
HENRY WOLLMAN,
VIRGIL P. KLINE, AND
S. H. TOLLES,
Att'ys for Andrews Institute for Girls.
HAROLD NATHAN,
Attorney for Norman C. Andrews et al.

Amended and Supplemental Complaint, Verified April 20, 1904.

Supreme Court, New York County.

GAMALIEL C. ST. JOHN, as Executor of and Trustee under the Last Will and Testament of Wallace C. Andrews, Deceased, Plaintiff,

against

THE ANDREWS INSTITUTE FOR GIRLS, SMITHSONIAN INSTITUTION, MELVILLE W. FULLER, as Chancellor of the Smithsonian Institution, and JOHN CUNNEEN, as Attorney-General of the State of New York; LURY ANN MOORE, PHEBE R. MOORE, LAWRENCE G. ANDREWS, EMMA H. ANDREWS, NORMAN C. ANDREWS, EDITH A. LOGAN, JULIA A. BRUCE, GAMALIEL C. ST. JOHN, GAMALIEL C. ST. JOHN, as Executor of the Last Will and Testament of Margaret M. St. John Andrews, Deceased, and GAMALIEL C. ST. JOHN, as Administrator with the Will Annexed of Georgie Boyden St. John, Deceased, Defendants.

Amended and Supplemental Complaint.

The plaintiff for an amended and supplemental complaint, by leave of this court, under an order dated the 18th day of April, 1904, to which reference is hereby made complaining of the defendants, alleges:

First. That Wallace C. Andrews, a resident of the City, County and State of New York, died in said City and County on the 7th day of April, 1899, seized and possessed of certain lands in the States of New York, New Jersey and Virginia, and possessed of certain personal property, having before his death made his last will and testament in due form of law to pass real and personal property, bearing date the 12th day of November, 1891, of which a copy is hereto annexed, marked A, and made part of this complaint.

Second. That on the 22d day of May, 1899, the said will was duly proved before one of the surrogates of the County of New York, as a will to pass real and personal property, and was thereupon duly recorded in the office of said Surrogate in Liber 604 of Wills, page 363.

Third. That Margaret M. St. John Andrews named in said will as executrix, died on the same day as testator, and on the 23d day of May, 1899, letters testamentary were duly granted by said Surrogate and issued to the plaintiff, who thereupon duly qualified and entered upon his duties as executor of said will, and ever since has been and now is sole acting executor thereof, and there are assets in his hands as such executor in the State of New York undistributed and applicable to the payment of legacies.

Fourth. That the Andrews Institute for Girls, defendant, is a foreign corporation created by and under the Laws of the State of Ohio, the incorporation of which the plaintiff procured as directed by the fifth clause of said will, and claims the residuary estate of the testator.

Fifth. On information and belief, that Exhibits B, C and D, annexed hereto, and made part hereof, are copies of cases adjudged in

the Supreme Court of Ohio, the highest court of law and equity therein, taken from the books of reports of cases adjudged in said court, which express the unwritten or common law of said State in force at the death of said testator and still, to the effect that the gift contained in the fourth, fifth and sixth clauses of said will was and is valid in Ohio.

Sixth. On information and belief, that Exhibit E, annexed hereto, and made part hereof, contains extracts from the statutes of Ohio in force at the death of said testator and still.

Seventh. On information and belief, that Exhibit F, annexed hereto and made part hereof, is a copy of an act of the Legislature of Ohio, which passed and became a law March 19, 1902.

Eighth. That Exhibit G, annexed hereto and made part hereof, is a copy of the certificate of incorporation of The Andrews Institute for Girls, defendant aforesaid, duly filed in the office of the Secretary of State of Ohio, on the 13th day of May, 1902.

Ninth. That all the members and directors of The Andrews Institute for Girls, defendant aforesaid, duly convened on the 29th day of May, 1902, at Willoughby, Lake County, Ohio to-wit: George K. Nash, Governor of the State of Ohio; Jacob A. Beidler Member of Congress for the Congressional District embracing said Town of Willoughby; Eugene V. Sawyer, Treasurer of said County of Lake; Willis C. Collister, Mayor of said Town of Willoughby; Gamaliel C. St. John, Hiram F. Kennedy, and Albert H. Van Gorder, and organized by the election of president and other officers and the adoption of by-laws and then and there by resolution accepted the gift under said will.

Tenth. On information and belief, that the defendant Smithsonian Institution is, and at the death of the testator was, an establishment consisting of more than seven members, having certain corporate powers, created by and under the laws of the United States and located in the District of Columbia, that the defendant Melville W. Fuller is the Chancellor thereof, exercising the functions of president, and that it claims the residuary estate of the testator or some part thereof.

Eleventh. On information and belief, that Exhibit H, annexed hereto and made part hereof, contains extracts from the statutes of the United States relating to said Smithsonian Institution in force at the death of said testator and still.

Twelfth. That the defendant John Cunneen is the Attorney General of the State of New York, and on information and belief, that as such he has or claims to have some interest in the premises by virtue of Chapter 701 of the Laws of 1893, or otherwise.

Thirteenth. On information and belief, that the said Wallace C. Andrews, deceased, left him surviving his sisters Lury Ann Moore and Phebe R. Moore, his brother Lawrence G. Andrews, his half sister Emma H. Andrews, his half brother Norman C. Andrews, and his nieces (daughters of a deceased brother), Edith A. Logan and Julia A. Bruce, defendants herein, his only heirs-at-law and next of kin.

Fourteenth. On information and belief, that the defendants Lury Ann Moore, Phebe R. Moore, Lawrence G. Andrews, Emma H.

Andrews, Norman C. Andrews, Edith A. Logan and Julia A. Bruce claim to have some interest in the estate of said Wallace C. Andrews, deceased, as heirs-at-law and next of kin.

Fifteenth. That the legacies under said will to the defendants Lury Ann Moore, Phebe R. Moore, Emma H. Andrews and Julia A. Bruce have been paid.

Sixteenth. That heretofore this plaintiff filed an account of his proceedings as executor of said will and asked for the judicial settlement thereof and the defendant Norman C. Andrews, claiming to be a person interested in the estate of said Wallace C. Andrews, deceased, on the ground that he died intestate as to some part of his estate, moved in the Surrogate's Court for the County of New York for leave to appear on the accounting of this plaintiff and file objections to his said account, but said motion was denied, and an order to that effect was heretofore and since the commencement of this action duly entered in said Surrogate's Court, and said defendant has appealed therefrom to the Appellate Division of the Supreme Court, which appeal is now pending undetermined.

Seventeenth. That heretofore and after the entry of the said order the defendants Emma H. Andrews and Edith A. Logan made similar motions, and the motion of Emma H. Andrews has been denied; in that of Edith A. Logan a reference has been ordered to take proof upon the issues and report.

Eighteenth. That there is danger that the defendants Lury Ann Moore, Phebe R. Moore, Lawrence G. Andrews and Julia A. Bruce may make similar claims and motions to those made by the defendants Norman C. Andrews, Emma H. Andrews and Edith A. Logan, or that the defendants named in this paragraph or some of them may commence actions, and that thus plaintiff and the estate of his decedent may be subjected to a multiplicity of suits or legal proceedings.

Nineteenth. That said Margaret M. St. John Andrews left a last will and testament, which was duly admitted to probate by one of the Surrogates of the County of New York on the 28th day of April, 1899, and thereupon letters testamentary were duly issued to the defendant Gamaliel C. St. John, who duly qualified and has since continued to act as sole executor thereof.

Twentieth. On information and belief, that Georgie Boyden St. John, mentioned in the said will of said Wallace C. Andrews, deceased, died on the 7th day of April, 1899, subsequent to the death of said Wallace C. Andrews. She left a last will and testament, which was duly admitted to probate by one of the Surrogates of the County of New York, on the 3d day of May, 1899, and thereupon letters of administration with the will annexed were duly issued to the defendant Gamaliel C. St. John, who duly qualified and has since continued to act as such administrator.

Twenty-first. That all the debts of said testator Wallace C. Andrews have been paid or provided for, and a large amount of assets and real estate in the State of New York remains undisposed of.

Twenty-second. Plaintiff further alleges that as to his duty in the execution of the trusts and obligations imposed upon him by said will of said Wallace C. Andrews, deceased, he is advised by his legal

counsel and believes that various questions and doubts have arisen as to the construction thereof and the validity of certain provisions therein, by reason of which plaintiff cannot safely proceed to pay over the residue of said estate without the instruction and judgment of this court, and by this action he desires to submit the said question and doubts to the determination of this court and himself to its directions concerning the same, among which questions and doubts are the following:

1. Whether under said will there is an equitable conversion of the real estate of said testator into personalty as of the date of his death.

2. Whether the provisions of the fourth, fifth and sixth clauses of said will are valid, to what extent and what is their true construction.

3. Whether The Andrews Institute for Girls, defendant aforesaid, is entitled to the residuary estate of said testator.

4. In case the provisions of the said fourth, fifth and sixth clauses or any of them are invalid, or The Andrews Institute for Girls, defendant aforesaid, is not entitled to said residue, or any part thereof, whether the defendant Smithsonian Institution is entitled thereto pursuant to the provisions of the eighth clause of said will.

5. In case neither of said defendants is entitled what disposition shall be made of said residue.

6. Whether the heirs at law or next of kin of said testator are entitled to any portion of his estate.

Wherefore, the plaintiff demands judgment that the defendants Lury Ann Moore, Phebe R. Moore, Lawrence G. Andrews, Emma H. Andrews, Norman C. Andrews, Edith A. Logan, and Julia A. Bruce, and each of them be excluded from all interest in the estate of said testator, and that this court determine the above questions and all others that may arise herein, and declare and forever settle the true construction, intent, meaning and effect of said will so far as relates to the residuary estate of said testator; the validity or invalidity of the fourth, fifth and sixth clauses thereof and of the incorporation and organization of The Andrews Institute for Girls, defendant aforesaid, in relation to said clauses, and the rights, if any, of the defendant Smithsonian Institution in the premises; and direct the plaintiff to dispose of the said residuary estate in such manner as may be decided to be legal; and that plaintiff have such further relief as may be just with costs.

JAMES W. HAWES,
Attorney for Plaintiff, 35 Nassau Street,
Borough of Manhattan, New York City.

A.

Will of Wallace C. Andrews.

I, Wallace C. Andrews, of the City, County and State of New York, do make this my last will and testament.

First: I direct my executor and executrix, as soon as practicable after my death (if my estate, after the payment of my just debts, funeral expenses and cost of administration, shall exceed the sum of

five hundred thousand dollars), to pay to my sisters, Lury Ann Andrews Moore (wife of William G. Moore), and Phebe R. Andrews Moore (wife of Thomas L. Moore), both of Youngstown, Ohio, the sum of ten thousand dollars each.

If my said sister Lury shall die before me, then the ten thousand dollars bequeathed to her shall go to her daughters Julia and Lucia, share and share alike, or to the survivor of them, and if my said sister Phebe shall die before me, then the ten thousand dollars bequeathed to her shall go to her daughter Helen and her son Lawrence, share and share alike, or to the survivor of them.

Second: All the rest and residue of my estate, both real and personal, whether now owned by me or hereafter, acquired, including all lapsed legacies and devises, I devise and bequeath to my executor and executrix, in trust to collect and receive the rents, issues, income and profits thereof and pay them over from time to time to my wife, Margaret M. St. John Andrews, for her own use, for and during her natural life, and upon her death to dispose of my said residuary estate as hereinafter provided.

Third: Upon her death I devise and bequeath the sum of five hundred thousand dollars, if my estate shall exceed that sum, and if it shall not exceed that sum, then my entire estate, as follows:

One-fourth to my said sister Lury; one-fourth to my said sister Phebe; one-eighth to my sister of the half-blood, Emma Andrews, of Youngstown, Ohio; one-eighth to my niece Julia Andrews, daughter of my brother Chauncey H. Andrews of Youngstown, Ohio; one-eighth to Gamaliel C. St. John, now residing in New York City, brother of my said wife, and one-eighth to George Boyden St. John, wife of the said Gamaliel C. St. John.

If my said sister Lury shall die before me or during the lifetime of my said wife, then the one-fourth bequeathed to her shall go to her daughters Julia and Lucia, share and share alike, or to the survivor of them, and if my said sister Phebe shall die before me or during the lifetime of my said wife, then the one-fourth bequeathed to her shall go to her daughter Helen and her son Lawrence, share and share alike, or to the survivor of them.

Fourth: Upon the death of my said wife, I devise and bequeath to the corporation hereinafter directed to be formed, all the excess and residue of my estate over the sum of five hundred thousand dollars specified in the third paragraph hereof.

Fifth: I direct my executor and executrix as soon as practicable after my decease and during the lives of my said wife and her said brother or the life of the longest liver of them, to procure under the laws of the State of Ohio, an incorporation to be formed with proper powers, for the purpose of establishing an institution on the farm known as the Williams Farm, formerly owned by me and now owned by my wife, fronting on Erie street, in the town of Willoughby, Lake county, Ohio, or if said farm be for any cause not available, then on other suitable premises in the said town of Willoughby, for the free education of girls and for their support in proper cases during education, with a special view toward rendering them self-supporting.

Said institution shall contain, among others, a Sewing Department, Cooking Department, Designing Department and Departments of Phonography and Typewriting and other useful work that would afford the pupils employment in life, including such new discoveries and inventions as may be made from time to time tending to enlarge the opportunities for useful and honorable employment for women, and such as will aid them in obtaining honorable and independent positions in life. Such school to be open only to girls between the ages of ten and sixteen, both inclusive.

Not exceeding one-tenth of the sum devoted to the said institution by the fourth paragraph hereof may be used for the erection of suitable buildings therefor on the said farm, or in the contingency above specified, for the purchase of suitable premises in said town and the erection of such buildings thereon, and the income of the remaining nine tenths shall be devoted to the support and maintenance of said institution.

If, when the said sum shall be received by the said corporation, the one-tenth thereof shall not, in the judgment of the directors, be sufficient for such erection or such purchase and erection as the case may be, the whole sum may, in their discretion, be allowed to accumulate until the one-tenth thereof with its accumulation shall be so sufficient, when such one-tenth may be used therefor, while the income of the remaining nine-tenths of said sum and accumulations shall be devoted to the support and maintenance of said institution.

The charter of the said corporation shall also provide, if and so far as may be consistent with law and practicable, for the management of the said corporation by a board of five directors, to consist of the Governor for the time being of the State of Ohio, the Member of Congress for the time being for the Congressional district embracing said Town of Willoughby, the Treasurer for the time being of said County of Lake, the Mayor for the time being of Willoughby, and the said Gamaliel C. St. John, and for the choice of a resident of Willoughby by the said Governor as successor to the said St. John as often as the fifth place shall become or be vacant.

Sixth: If my said wife shall die before me, then the dispositions provided for in the third and fourth paragraphs hereof shall take effect upon my death.

Seventh: I direct my said executor and executrix as soon as they may deem advisable, but within two years after my decease, to sell all my real estate and invest the proceeds in interest paying securities, and as to all my estate I give them and my trustees power to invest and re-invest the same or any part thereof, having regard both to income and safety.

Eighth: In case my intention with respect to the said institution for girls shall because of illegality fail, or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution at Washington, District of Columbia, to be devoted to the purposes for which it was established.

Ninth: I appoint my said wife executrix and my said brother-in-law executor of this my will, and neither as such nor as trustees shall they be required to give security. All the powers herein granted to

them may be exercised by the survivor of them and unless limited to their lives, by their successor or successors in the administration of my estate.

In witness whereof I have at the end hereof subscribed my name and affixed my seal this 12th day of November, 1891.

WALLACE C. ANDREWS.

Witnesses: Residences:
O. P. SHAFFER, 319 *Lenox Avenue, New York City.*
LEWIS COON, 317 *W. 126th St., New York City.*

Exhibits B, C and D are copies of the opinions of the Supreme Court of the State of Ohio in the following cases:

The Trustees of the McIntire Poor School *v.* the Zanesville Canal and Manufacturing Company and others, 9 Ohio reports, 203;

Samuel Landis and Jacob Vaniman, executors of John Urmey, deceased, *v.* Levi Wooden, Elizabeth, his wife, and others, 1 Ohio State Reports, 160;

And Sowers *v.* Cyrenius, 39 Ohio State Reports, 29.

E.

Revised Statutes of Ohio, in Force in 1899 *and since.*

SEC. 205. He [Attorney General] shall cause proper suits to be instituted to enforce the performance of trusts for charitable and educational purposes, and restrain the abuse thereof, whenever, upon the complaint of others, or from his own knowledge, he deems such suit to be advisable or whenever by the Governor, the Supreme Court, or the General Assembly, or either branch thereof, he is directed so to do; which suits may be brought in his own name, on behalf of the State, or the beneficiaries of the trust, in the Court of Common Pleas of Franklin County or in the Court of Common Pleas of any county wherein the trust property, or any part thereof, is situate or invested, as he prefers; and no such suit shall abate or discontinue by any change of the officer, but shall be prosecuted to final judgment or mandate, as if no such change had occurred; but the Attorney General may refuse to institute proceedings as aforesaid except when directed by the Governor, the Supreme Court, or the General Assembly, or either branch thereof, unless some responsible freeholder of the State will become relator in the cause, and liable for the costs thereof; but whenever the Governor, the Supreme Court, or the General Assembly, or either branch thereof, directs any such suit, he shall cause the same to be commenced and diligently prosecuted without any other relator (1 Bates, 2d ed., p. 124).

SEC. 3235. Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves, except for carrying on professional business.

* * * And if the organization is for profit, it must have a capital stock. * * * (2 Bates, 2d ed., p. 1836).

SEC. 3236. Any number of persons, not less than five, a majority of whom are citizens of this State, desiring to become incorporated, shall subscribe and acknowledge, before an officer authorized to take acknowledgements of deeds, articles of incorporation, the form of which shall be prescribed by the Secretary of State, which must contain:

1. The name of the corporation, which shall begin with the word The" and end with the word "Company," unless the organization is not for profit.

2. The place where it is to be located, or where its principal business is to be transacted.

3. The purpose for which it is formed.

4. The amount of its capital stock, if it is to have capital stock, and the number of shares into which the stock is divided.

* * * * * * *

(2 Bates, 2d ed., p. 1937.)

SEC. 3238. The official character of the officer before whom the acknowledgment of articles of incorporation is made shall be certified by the Clerk of the Court of Common Pleas of the county in which the acknowledgment is taken, and the articles shall be filed in the office of the Secretary of State, who shall record the same, and a copy duly certified by him shall be *prima facie* evidence of the existence of such corporation; and all certificates thereafter filed in the office of the Secretary of State relating to the corporation shall be recorded. * * * (2 Bates, 2nd ed., p. 1838).

SEC. 3239. Upon such filing of the articles of incorporation, the persons who subscribed the same, their associates, successors and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession and power to sue and be sued, contract and be contracted with, acquire and convey at pleasure all such real or personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, and to make and use a common seal, the same to alter at pleasure, and to do all needful acts to carry into effect the objects for which it was created (2 Bates, 2nd ed., p. 1840).

SEC. 4111. The acknowledgment of an instrument for the conveyance or encumbrance of lands tenements or hereditaments situate within this State may be made without this State before a Commissioner appointed by the Governor of this State for that purpose. * * * (2 Bates, 2nd ed., p. 2288).

F.

An Act to Provide for the Administration of Charitable Trusts in Certain Cases.

Be it enacted by the General Assembly of the State of Ohio.

SECTION 1. Whenever, by the last will and testament of any person which has heretofore been, or shall hereafter be, duly admitted to

probate in this State or elsewhere, any decedent has devised or bequeathed, or may devise or bequeath, his or her property, or any portion thereof, for charitable uses within this State or for the establishment and maintenance of any industrial or educational school or institution to be located at any place within this State; and whenever, in any such will and testament it has been or may be, provided that the executor or executors thereof shall organize a corporation under the laws of this State for the purpose of receiving the property so devised or bequeathed, and carrying out the charitable purposes in such will expressed, or establishing and maintaining the institution or school therein provided for, and such will further provides for the management of such corporation by a board of trustees or directors, consisting in part, of officials of this State, of the county in which such charities are to be administered or such institution or school located, the officials of any municipal incorporation in said county, and the member of Congress for the district of which said county forms a part, or any of such officials, and names any other person or persons to be associated with said officials or any of them, and provides for the appointment of a successor or successors to the person or persons so appointed to act with such officials in any manner specified in said will, such executor or executors, or his or their successors in office, and the persons hereinafter named, may constitute themselves a body corporate, with the general powers of benevolent incorporations.

SECTION 2. Such executor or executors, or his or their successors, shall associate with himself or themselves not more than two citizens and residents other than the persons named in said will, of the county in which such charities are to be administered, or such institution or school located, and he or they and such associates shall execute and acknowledge and file with the Secretary of State of the State of Ohio, articles of incorporation; or, in case he or they do not file such articles within sixty days from and after the passage of this act, or in case of any will which may hereafter be so probated, within six months of such probate, then a majority of the officials for the time being named in any such will or testament may execute, acknowledge and file such articles, which shall in either case set forth:

1. A copy of the will or testament for the carrying out of whose provisions the incorporation is organized.

2. The name of the corporation, which shall include the name of the maker of such will, unless otherwise therein provided, and

3. The location of such corporation.

SECTION 3. The officers or officials named in such will or testament, together with the persons therein named, and in case the articles are filed by the executor or executors as hereinbefore provided the citizens of said county, not exceeding two in number, who execute and acknowledge the same with such executor or executors, shall thereupon become the members and directors of such corporation and as the term of any official expires, his successor shall thereupon, by virtue of his office, become one of the members and directors of such corporation, so that the officials named in said will shall, for the time being and from time to time, be directors of said incorporation.

Upon the death or resignation of the person or persons named in such will as directors associated with such officials, his or their successor or successors shall from time to time be appointed in the manner provided in such will or testament, if provision therefor be made otherwise by the board of directors, and he or they shall thereupon become members and directors of such incorporation. Upon the death or resignation of the two citizens of the county, or either of them, who have become directors by reason of joining in said articles of incorporation, his or their successor or successors shall from time to time be chosen by the board of directors, and he or they shall thereupon become members and directors of such incorporation.

SECTION 4. The Attorney General of the State of Ohio shall in his official capacity have power to bring proceedings in any court of record to enforce any such devise or bequest, whenever he deems such action necessary for the protection and carrying out of the purposes named in said last will and testament, without waiting for the organization of such corporation.

SECTION 5. The officers of such corporation shall consist of a president, secretary and treasurer and such other officers as the board of directors may deem necessary. The president shall be a member of the board of directors.

SECTION 6. The board of directors may adopt, and from time to time change, such organic rules, regulations and by-laws as they may deem expedient, not inconsistent with the Constitution and laws of this State.

SECTION 7. Until the estate shall be finally settled, the board of directors may meet in the State of the domicile of the testator.

SECTION 8. This act shall take effect and be in force from and after its passage.

G.

Articles of Incorporation of The Andrews Institute for Girls.

These Articles of Incorporation of The Andrews Institute for Girls, witness:

That we, the undersigned, Gamaliel C. St. John, of the City and State of New York, and Hiram F. Kennedy, W. C. Collister, E. V. Sawyer and Albert H. Van Gorder, of the County of Lake, State of Ohio, desiring to form a corporation, not for profit, pursuant to the laws of the State of Ohio, for the purpose of receiving the property devised and bequeathed in and by the Wills of Wallace C. Andrews and Margaret M. St. John Andrews, late of the City and State of New York, to the corporation therein directed to be formed, and for the purpose of carrying out the charitable purposes in such Wills expressed and of establishing and maintaining the institution therein provided for, do hereby certify:

First. That the said Wills have been duly admitted to probate in the State of New York, and that the following are copies of the said Wills respectively:

[Here follows a copy of the Will of Wallace C. Andrews; also a copy of the Will and Codicil of Margaret M. St. John Andrews.]

Second. The name of the said corporation shall be "The Andrews Institute for Girls."

Third. The said corporation shall be located in the town of Willoughby, Lake County, Ohio.

Fourth. The members of this corporation shall consist of George K. Nash, Governor of the State of Ohio; Jacob A. Beidler, member of Congress for the Congressional District embracing said town of Willoughby; Eugene V. Sawyer, Treasurer of the said County of Lake, and Willis C. Collister, Mayor of the said town of Willoughby, while holding said offices respectively, and of their respective successors in office, during their respective terms, together with Gamaliel C. St. John of the City of New York, a resident of said town of Willoughby, to be chosen by the Governor for the time being of the State of Ohio, as successor of the said St. John, as often as the fifth place shall become or be vacant (provided that if the Governor for the time being shall, for three months after any such vacancy shall occur, fail to fill the same such vacancy shall be filled by the Board of Directors), and the said Hiram F. Kennedy and Albert H. Van Gorder and their successors to be chosen from time to time by the Board of Directors as either of their places shall become or be vacant.

Fifth. Such members and their successors shall, during the time of their membership, be and constitute the Board of Directors for the administration and management of the property and trust or other funds of the corporation and for the control and management of the said institution.

In witness whereof we have hereunto set our hands and seals this 8th day of May, in the year one thousand nine hundred and two.

GAMALIEL C. ST. JOHN. [SEAL.]
H. F. KENNEDY.
W. C. COLLISTER.
E. V. SAWYER.
ALBERT H. VAN GORDER.

[Duly acknowledged by the subscribers and duly certified by the proper clerks of the Court of Common Pleas, in accordance with the laws of Ohio]

UNITED STATES OF AMERICA,
State of Ohio:

OFFICE OF THE SECRETARY OF STATE.

I, Lewis C. Laylin, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of "The Andrews Institute for Girls," filed in this office on the 13th day of May A. D. 1902, and recorded in Volume 90, page 483, of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 13th day of May, A. D. 1902.

[SEAL.]

LEWIS C. LAYLIN,
Secretary of State.

Exhibit H sets forth sections 5579 to 5594, both inclusive, of the Revised Statutes of the United States, creating the Smithsonian Institution.

Amended Answer of Defendants Smithsonian Institution and Melville W. Fuller, as Chancellor, Verified June 12, 1905.

[Title.]

The defendants, the Smithsonian Institution and Melville W. Fuller, as Chancellor of the Smithsonian Institution, for an amended answer to the amended and supplemental complaint herein, allege as follows:

First. Admit the allegations contained in paragraphs numbered First, Second, Third, Sixth, Seventh, Eighth, Ninth, Eleventh and Twelfth of the amended and supplemental complaint herein.

Second. Admit that the Andrews Institute for Girls, defendant, was attempted to be organized under an act of the General Assembly of the State of Ohio, entitled "an act to provide for the administration of charitable trusts in certain cases," a copy of which said act is annexed to and made part of the complaint herein, and which was passed by said General Assembly of the State of Ohio, and became a law of said State on or about the 19th day of March, 1902. But *this* defendant- alleges that the said Institute had no existence at the death of the testator, Wallace C. Andrews, or at the death of the said testator's wife, but was attempted to be organized as aforesaid about three years afer their respective deaths. *This* defendant- further alleges that said act of the General Assembly of the State of Ohio, was and is unconstitutional and void in that it was and is contrary to Section 1 of Article 13 of the Constitution of the State of Ohio, which provides that "The General Assembly shall pass no special act conferring corporate powers;" as by said constitution or a duly certified copy thereof in court to be produced, will more fully and at large appear; and the alleged organization of said Institute under and pursuant to the terms of said Act was without authority of law, and in all respects void and without effect, and that by reason thereof said Andrews Institute for Girls was not and never has been duly incorporated pursuant to the laws of the State of Ohio or otherwise; and *this* defendant- denies that said corporation was procured as directed by the fifth clause of said will.

Third. Admit the allegations contained in paragraph numbered fifth of the amended and supplemental complaint herein, except the conclusion that the gift contained in the Fourth, Fifth and Sixth clauses of the said will was and is valid in Ohio, and as to this allegation the defendants deny that they have any knowledge or information sufficient to form a belief and leave the plaintiff to make such proof thereof as he may be advised.

Fourth. In answer to paragraph numbered Tenth of the amended and supplemental complaint herein, the defendants admit that the Smithsonian Institution is and at the time of the death of the testator was an establishment consisting of more than seven members

created by and under the laws of the United States and has such powers only as are defined in those laws. The defendants admit that the business of the said Institution is conducted in the District of Columbia and that its chief place of business is in said District, but say that said Institution is not local but national and not only that but it is an international institution whose operations reach out to every portion of the globe. It has agents in London, Buda Pesth and Leipsic for the transaction of the business of its exchanges, from which offices it issues circulars and otherwise transacts business. The Institution has about forty thousand correspondents scattered all over the civilized globe, even in some of the most remote corners of India, Asia, Australia and Polynesia.

The defendants admit that Melville W. Fuller, Chief Justice of the United States, is at present the Chancellor of the Institution. The Chancellor presides over the Board of Regents, being chosen for that office by the Board. The President of the United States is the President of the establishment. Under the Act of Congress creating the establishment, the business of the Institution is conducted by a Board of Regents composed of the Vice-President of the United States, the Chief Justice, three members of the Senate, and three members of the House, together with six persons other than members of Congress. The six other persons are appointed by joint resolution of Congress. The Secretary of the Institution is elected by the Board of Regents and is at the same time Secretary of the establishment and Secretary of the Board of Regents. The Secretary takes charge of the property of the Institution, keeps a record of their proceedings, discharges the duties of librarian and keeper of the museum and may, with the consent of the Board of Regents, employ assistants. The Board of Regents also elects three of their own body as an Executive Committee.

The main support of the Institution is the fund from James Smithson, which the United States holds in trust. This fund amounted to nearly Seven hundred thousand dollars, to which private gifts have been added, so as to bring the amount up to nearly One million dollars, on which first million Congress has authorized the Treasurer to pay six per cent. interest.

The Smithsonian Institution is authorized by statute to receive money or other property by gift, bequest or devise and to hold or dispose of the same in promotion of the purposes for which the Institution was established.

The present Secretary is Samuel Pierpont Langley, who has the custody of the seal of the Institution, and also authority in the usual course of business of his office to affix said seal to legal papers as representing the act and deed of said Institution.

The defendants admit that the Smithsonian Institution claims the residuary estate of the testator.

Fifth. The defendants deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth and Twenty-first of the amended and supplemental complaint herein.

Sixth. The defendants acquiesce and join in the action of the plaintiff in submitting to the determination of the court the questions formulated in paragraph numbered Twenty-second of the amended and supplemental complaint herein, and the defendants allege, on information and belief that the testator attempted to bequeath more than one-half of his estate to the Andrews Institute for Girls, that said Andrews Institute for Girls is a benevolent or charitable corporation and that said attempted bequest to the corporation to be created after the death of the testator, namely, the Andrews Institute for Girls, which the plaintiff herein procured to be incorporated under the laws of the State of Ohio is invalid, and that the testator's intention with respect to said Andrews Institute for Girls has, because of illegality, failed and has become impossible of realization; that the Smithsonian Institution is not a benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, and the sum intended for the Andrews Institute for Girls belongs to the defendant the Smithsonian Institution to be devoted to the purposes for which said Institution was established.

Seventh. The defendants deny each and every allegation contained in the amended and supplemental complaint herein not hereinbefore specifically admitted, qualified or denied.

Wherefore, defendants demand judgment that the defendants The Andrews Institute for Girls, John Cunneen, as Attorney General of the State of Nw York, Lury Ann Moore, Phebe R. Moore, Lawrence G. Andrews, Emma H. Andrews, Norman C. Andrews, Edith A. Logan and Julia A. Bruce, and each of them, be excluded from all interest in the estate of said testator, Wallace C. Andrews, deceased, and they further pray that the Smithsonian Institution be adjudged to be entitled to the residuary estate of said Wallace C. Andrews and all the property now in the hands of said Gamaliel C. St. John, either as trustee or executor, and that the plaintiff be directed to pay over to the said Smithsonian Institution, or its proper representative, all and every sum of money that upon proper accounting shall be found to be due to the Smithsonian Institution, and that the defendant Smithsonian Institution be adjudged to be the absolute owner in fee simple of all the undisposed real estate of said Wallace C. Andrews, and that said plaintiff be directed to make proper conveyance thereof to the Smithsonian Institution, and for such other and further relief as may be just, together with costs.

WETMORE & JENNER,
Attorneys for Defendants Smithsonian Institution and Melville W. Fuller, as Chancellor, 34 *Pine Street, New York City.*

Amended Answer of Defendant The Andrews Institute, Verified June 17, 1905.

(Title.)

The defendant, The Andrews Institute for Girls, by Henry Wollman, its attorney, for an amended answer to the amended and supplemental complaint herein, alleges:

I. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations in paragraphs tenth, eleventh, twelfth, thirteenth, and twentieth of the complaint contained, except the allegation in paragraph twelve that John Cunneen is Attorney General of the State of New York.

II. Admits each and every allegation in the complaint contained not hereinbefore denied.

For a Counterclaim this Defendant Alleges:

I. That Wallace C. Andrews, a resident of the City, County and State of New York, on November 12th, 1891, made his last will and testament in due form of law to pass real and personal property, and of which said will a copy is hereto annexed, marked Exhibit A, and made a part of this answer.

II. That said Wallace C. Andrews then being a resident of the City, County and State of New York, died in said City and County on April 7th, 1899, seized and possessed of lands in the State of New York and elsewhere, and possessed of personal property in the County and State of New York and elsewhere.

III. That in said will Margaret M. St. John Andrews, the wife of said Wallace C. Andrews, and the plaintiff, Gamaliel C. St. John, her brother, were named as sole executors of said will. That said Margaret M. St. John Andrews is dead.

IV. That on May 22nd, 1899, said will was duly proved before one of the Surrogates of the County of New York as a will to pass real and personal property, and was thereupon duly recorded in the office of the Surrogate in said county in Liber 604 of Wills, page 363.

V. That on May 23rd, 1899, letters testamentary were duly granted by a Surrogate of New York county and issued to the plaintiff, Gamaliel C. St. John, said Margaret M. St. John Andrews then being dead, who thereupon duly qualified and entered upon his duties as executor of said will, and ever since has been and now is sole acting executor thereof.

VI. That said will contained a provision directing said executor and executrix, as soon as practicable after the decease of said Wallace C. Andrews, and during the lives of said executor and executrix or the life of the longest liver of them, to procure under the laws of the State of Ohio, an incorporation to be formed with proper powers for the purpose of establishing an institution on the farm known as the Williams Farm, formerly owned by said Wallace C.

Andrews, and subsequently owned by his wife, fronting on Erie street, in the Town of Willoughby, Lake county, Ohio, or if said farm were for any cause not available, then on other suitable premises in the said Town of Willoughby, for the free education of girls, and for their support in proper cases during education, with a special view toward rendering them self-supporting.

VII. That under and in pursuance of said provision of said will, said Gamaliel C. St. John, executor, procured under and in pursuance to the Laws of the State of Ohio, a corporation to be formed with proper powers for the purpose of establishing an institution on the farm known as the Williams Farm, formerly owned by said Wallace C. Andrews, and at the time of his death owned by his said wife, fronting on Erie street, in the Town of Willoughby, Lake county, Ohio, or on any other suitable premises in said Town of Willoughby, for the free education of girls and for their support in proper cases during education, and with a special view towards rendering them self-supporting.

VIII. That said corporation so formed by said plaintiff under the Laws of Ohio, has a valid and legal existence under the Laws of Ohio, and conforms in every particular to and with all the conditions and requirements of said will.

IX. That this defendant, The Andrews Institute for Girls, is such corporation so formed under the Laws of Ohio by said executor, Gamaliel C. St. John, under and in pursuance to the directions of said will.

X. That this defendant has full power, right and authority under the Laws of the State of Ohio, to receive, hold and administer all gifts, devises and bequests made to it in and under said will of said Wallace C. Andrews, and to sue for and recover the same, and that all the gifts, devises and bequests made to this defendant under said will of said Wallace C. Andrews, are valid, under the laws of said State of Ohio.

XI. That said will contained a clause which, after bequeathing a certain specified sum of money which has been paid, devised and bequeathed all the rest and residue of the estate of said Wallace C. Andrews, both real and personal, to said executor and executrix named in said will, in trust, to collect and receive the rents, issues, income and profits thereof, and pay them over from time to time to said Margaret M. St. John Andrews during her natural life, and upon her death said will provided that said residuary estate should be disposed of as follows: After bequeathing $500,000 to various persons, said Wallace C. Andrews devised and bequeathed all the excess and residue of his estate over the sum of $500,000 specified above, to the corporation directed, as above set forth, to be formed, and which is this defendant.

XII. That all the debts of said Wallace C. Andrews have been paid or provided for, and all the gifts, devises and bequests made in said will except those to this defendant have been paid or provided for, and that over and above the same a large sum of money, to-wit, over a half million dollars, and a large amount of other personal property, are still in the hands of the plaintiff in this action

as executor and trustee, and that there is a large quantity of real estate undisposed of belonging to said estate. That this defendant is entitled to all the money and personal property in the hands of the plaintiff and all the undisposed of real estate.

XIII. That at the time of the execution by said Wallace C. Andrews of said will, his wife, Margaret M. St. John Andrews, in every way agreed to, consented to, and in every way approved, ratified and confirmed said will, and each and every one of the provisions of said will under which this defendant is now entitled to the residuary estate of said Wallace C. Andrews, as hereinbefore set forth. That simultaneously with the execution of said will of said Wallace C. Andrews, said Margaret M. St. John Andrews, his wife, executed her will, in and by which she specifically consented and agreed to each and every one of the provisions of the will of said Wallace C. Andrews under which this defendant is entitled to the residuary of said estate, as hereinbefore set forth.

XIV. That said will of said Margaret M. St. John Andrews was duly admitted to probate by one of the Surrogates of the County of New York, and that on the 29th day of April, 1899, letters testamentary were duly granted by said Surrogate and issued to the defendant, Gamaliel C. St. John herein, who thereupon duly qualified and entered upon his duties as executor of said will and ever since has been and now is the sole acting executor thereof. That a copy of said will is hereto annexed, marked Exhibit B, and made a part of this answer.

XV. Upon information and belief that the defendants, the Smithsonian Institution and Melville W. Fuller, as Chancellor of the Smithsonian Institution, claim the whole or some part of the property and assets of said estate, to which this defendant is entitled as hereinbefore set forth, but said defendants have no right, title, interest or valid claim of any kind in and to any of said estate.

XVI. Upon information and belief that John Cunneen, Attorney General of the State of New York, claims some right, title or interest in said estate, but that said Cunneen has no right, title or interest of any kind in said estate.

XVII. Upon information and belief that the defendants, Lury Ann Moore, Phebe R. Moore, Lawrence G. Andrews, Emma H. Andrews, Norman C. Andrews, Edith A. Logan Julia A. Bruce, Gamaliel C. St. John as executor of the last will and testament of Margaret M. St. John Andrews, deceased, and Gamaliel C. St. John as administrator with the will annexed of Georgie Boyden St. John, deceased, claim some right, title or interest in said estate, but that neither the said defendants nor any of them have any right, title or interest of any kind in said estate.

Wherefore, this defendant prays judgment that this defendant be adjudged to be entitled to said residuary estate, and all the property and assets now in the hands of said Gamaliel C. St. John, either as trustee or executor, and directing that the plaintiff pay and deliver over the same to this defendant, and that this defendant be adjudged to be the absolute owner in fee simple of all the undisposed of real

estate of said Wallace C. Andrews, and that said plaintiff be directed to make proper conveyances thereof to this defendant.

This defendant further prays that the defendants, Smithsonian Institution, Melville W. Fuller and John Cunneen, Attorney General of the State of New York; Lury Ann Moore, Phebe R. Moore, Lawrence G. Andrews, Emma H. Andrews, Norman C. Andrews, Edith A. Logan, Julia A. Bruce, Gamaliel C. St. John, as executor and Gamaliel C. St. John as administrator, be adjudged and decreed to have no right, title, interest or claim in and to said property or any part thereof; and this defendant prays for such other and further relief as may be equitable, just and proper in the premises.

HENRY WOLLMAN,
Attorney for Defendant
The Andrews Institute for Girls.

Office and Post Office Address, No. 74 Broadway, Borough of Manhattan, New York City.

Here follow Ex. A, copy of the Will of Wallace C. Andrews, which is annexed to the amended and supplemental complaint; and Exhibit B, Will of Margaret M. St. John Andrews.

The other defendants filed answers and the plaintiff filed replies.

The trial judge made the following findings of fact, among others:

23. Georgie Boyden St. John survived Wallace C. Andrews.

87. The provisions of the fourth, fifth and sixth clauses of the will of Wallace C. Andrews are, and at the time of his death were, valid under the laws of the State of Ohio.

88. The Smithsonian Institution has, and at the time of decedent's death had, capacity to take under the provisions of the eighth clause of said will.

91. On or about the 13th day of May, 1902, Gamaliel C. St. John, the surviving executor named in the will of Wallace C. Andrews, procured an incorporation to be formed under the laws of the State of Ohio, entitled The Andrews Institute for Girls, located in said state, "for the purpose," as expressed in the certificate of incorporation, "of receiving the property devised and bequeathed in and by the wills of Wallace C. Andrews and Margaret M. St. John Andrews, late of the City and State of New York, to the corporation therein directed to be formed, and for the purpose of carrying out the charitable purposes in such wills expressed, and of establishing and maintaining the institution therein provided for."

92. Under the laws of the State of Ohio, The Andrews Institute for Girls has capacity to take the gift under the fourth, fifth and sixth clauses of the will of Wallace C. Andrews.

93. The Smithsonian Institution was established in the District of Columbia by Act of Congress prior to the death of Wallace C. Andrews, and was given by Congress and has power to receive money or other property by gift, bequest or devise.

94. The fact of survivorship as between the said Wallace C. Andrews and his wife, Margaret M. St. John Andrews, is unascertainable.

96. Wallace C. Andrews at the time of his death did not have a wife, child or parent.

112. The gift contained in the 4th, 5th and 6th clauses of the will of Wallace C. Andrews, deceased, was and is valid under the law of the State of Ohio.

113. All the members and directors of The Andrews Institute for Girls, defendant, aforesaid, duly convened on the 29th day of May, 1902, at Willoughby, Lake county, Ohio, to-wit: George K. Nash, Governor of the State of Ohio; Jacob A. Beidler, Member of Congress for the Congressional District embracing the said Town of Willoughby; Eugene V. Sawyer, Treasurer of said County of Lake; Willis C. Collister, Mayor of said Town of Willoughby; Gamaliel C. St. John, Hiram F. Kennedy, and Albert H. Van Gorder, and organized by the election of president and other officers and the adoption of by-laws, and then and there by resolution accepted the gift under said will.

120. At the time of the death of the testator, the common law doctrine relating to charitable devises, legacies and trusts prevailed in Ohio and still prevails there.

121. At the time of the death of the testator, the *cy pres* doctrine relative to charitable devises, legacies and trusts prevailed in the state of Ohio and still prevails there.

125. The constitution of Ohio provides that the General Assembly shall pass no special act conferring corporate powers; that corporations may be formed under general laws, but all such laws may from time to time be altered or repealed; and that all laws of a general nature shall have a uniform operation throughout the state.

Judgment.

At a Special Term of the Supreme Court, Part IV, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, on the 24th day of January, 1906.

Present: Hon. Victor J. Dowling, Justice.

[Title.]

This case having been tried before the court without a jury, the plaintiff appearing by James W. Hawes, his attorney; the defendant The Andrews Institute for Girls, by Henry Wollman, its attorney; the defendants Smithsonian Institution and Melville W. Fuller, as Chancellor of the Smithsonian Institution, appearing by Wetmore & Jenner, their attorneys, the defendant Attorney General of the State of New York appearing by William J. Townsend, his attorney; the defendants Volney Rogers, as ancillary administrator of the goods, chattels and credits of Lawrence G. Andrews, deceased, Emma H. Andrews, and Norman C. Andrews appearing by Nathan, Leventritt & Perham, their attorneys; the defendants Lury Ann Moore, Phebe R. Moore and Edith A. Logan appearing by Henry M. Earle, their attorney; the defendant Julia A. Bruce appearing by Charles W. U. Sneed, her attorney; the defendants Gamaliel C. St. John,

Gamaliel C. St. John, as executor of the last will and testament of Margaret M. St. John Andrews, deceased, and Gamaliel C. St. John, as administrator with the will annexed of Georgie Boyden St. John, deceased, appearing by Herbert H. Gibbs, their attorney; and the Court having rendered its decision, stating separately the facts found and the conclusions of law and directing the judgment to be entered thereon; and such decision having been duly filed.

[Provision for costs and allowances.]

Adjudged that:

1. The plaintiff's testator, Wallace C. Andrews, did not die intestate as to any portion of his estate or the income thereof.

2. The defendant Gamaliel C. St. John is entitled to the legacy of one-eighth of the sum of five hundred thousand dollars bequeathed to him in the third paragraph of the will of said Wallace C. Andrews, deceased, with interest thereon.

3. The defendant Gamaliel C. St. John, as administrator with the will annexed of Georgie Boyden St. John, deceased, is entitled to the legacy of one-eighth of the sum of five hundred thousand dollars bequeathed to the said Georgie Boyden St. John in the third paragraph of the will of the said Wallace C. Andrews, deceased, with interest thereon.

4. The defendant The Andrews Institute for Girls is entitled to the residuary estate of the said Wallace C. Andrews, deceased, together with the income thereof which has accrued since the death of said deceased, after paying the expenses of administration.

5. The defendants Lury Ann Moore, Phebe R. Moore, Volney Rogers, as ancillary administrator of the goods, chattels and credits of Lawrence G. Andrews, deceased, Emma H. Andrews, Norman C. Andrews, Edith A. Logan, and Julia A. Bruce have no interest in the estate of the said Wallace C. Andrews, deceased.

6. The defendant Smithsonian Institution has no interest in the estate of the said Wallace C. Andrews, deceased.

[Judgment for costs and allowances.]

Enter,

VICTOR J. DOWLING, *J. S. C.*
PETER J. DOOLING, *Clerk.*

Endorsed: Filed Jan. 25, 1906.

Upon the trial of the cause there were admitted in evidence the Ohio statutes and decisions attached to the amended complaint, and also the following session laws and sections of the Revised Statutes of Ohio:

53 O. L., p. 33:

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That whenever any person shall, by deed, devise, gift or otherwise, set apart any lands, moneys or effects, as an endowment of a school or academy, not previously established, and shall not provide for the management of such school or academy, the court of common pleas of the proper county shall appoint five trustees, who shall have the control and management of the property, moneys and effects so set apart, and of the school or academy thus endowed, and shall

hold their offices for five years, and until their successors are elected and qualified; but in making the first appointment the court shall appoint one trustee for one year, one for two years, one for three years, one for four years, and one for five years. The trustees shall be a body corporate, with perpetual succession and by such name as may be ordered by the court making the first appointment; may sue and be sued; have a corporate seal and the same alter or change at pleasure, and may hold all kinds of estates, real, personal and mixed, which they may acquire by purchase, donation, devise or otherwise.

SEC. 2. The said court shall annually appoint one trustee, to fill the vacancy then occurring; and at any other time fill vacancies that may occur from any cause, for the unexpired term, said court shall also have power, upon sufficient cause shown, reasonable notice of the time and place of hearing having been given to the party interested, remove any trustee, and may, until a hearing be had, suspend a trustee in the exercise of his office.

SEC. 3. The trustees shall have power to establish, from time to time, rules and regulations for the management and safe keeping of the property, moneys and effects belonging to the trust, and the expenditure of the income thereof; and also for the management and government of the school or academy; which rules and regulation shall not be inconsistent with the terms of the deed, devise or gift, creating the endowment, or with the laws of this state; they shall not, at any time, or for any cause, incur any debt or liability; beyond the net income of the trust property, moneys and effects, or use or appropriate the same, otherwise than to invest for the purposes of income, any part of the principal thereof, unless expressly authorized so to do by the terms of the deed, devise or gift, creating the endowment or trust.

SEC. 4. The trustees shall, immediately after their appointment, organize by appointing a president, secretary and treasurer, from their own number, and shall severally take and subscribe an oath to faithfully discharge the duties of trustees, and shall deposit the same with the county auditor. They shall, also, before taking possession of the property, moneys or effects, constituting the endowment or trust, severally give bond, in such sum as the court may require, with two or more sufficient sureties to be approved by a judge of said court, whose approval shall be indorsed on the bonds, conditioned for the faithful management of the property, moneys and effects, entrusted to them and accountability therefor in such form as the court or judge may require; and the court may, from time to time, require additional bonds and surety, as may appear necessary for the preservation of the trust estate. The bonds required shall be payable to the State of Ohio, and deposited in the office of the county auditor for safe keeping.

SEC. 5. The trustees shall, on the second Monday of September in each year, and at such other times as the court may require, render a full and accurate account, statement and exhibit, of the condition of the school or academy under their management, and the condition of the trust estate and funds; and shall cause the same to be pub-

lished in such form as the court may direct; which account, statement and exhibit, shall be sworn to by the president, secretary and treasurer, or some two of them.

SEC. 6. The court of common pleas of the proper county, shall annually, at the first session after the second Monday in September, appoint three competent and disinterested persons, who shall have authority to visit any such school or academy and examine the same, together with the condition of the trust estate or endowment, and shall report thereon to the court making the appointment. The court shall also authorize such other visitations and examinations as may appear to be necessary.

SEC. 7. This act shall apply to endowments heretofore created, as well as to those hereafter created, and shall take effect from and after its passage.

Passed March 26, 1856.

[Also published as Sections 4105-67 to 4105-73 Revised Statutes of Ohio.]

60 O. L., p. 54:

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That the purchaser or purchasers of any railroad, situate wholly or partly within this state, which has been sold pursuant to judicial order, judgment or decree, or to such order, judgment or decree and express power, or the survivor or survivors or the assigns of such purchaser or purchasers, may acquire the franchise to be a corporation originally vested in the company which held the said railroad prior to such sale, by grant of said company under such terms and conditions as may be agreed upon by the directors of such company, with the consent of the stockholders owning two-thirds of the stock; which grant, being in the same form as is by law required to convey real estate, shall be effectual to pass the said franchise to the persons or company which shall have become the owners by purchase or assignment as aforesaid of such railroad: *Provided,* That no grant shall be made as aforesaid unless provision shall be made for granting to the stockholders in the original company stock in the reorganized company upon equal terms with the stockholders thereof, and as shall be acceptable to the directors making such grant.

SEC. 2. This act shall take effect from and after its passage.

Passed April 4, 1863.

Revised Statutes of Ohio:

SEC. 3426*a*. The purchaser or purchasers of the real and personal property, road-beds, rights of way, fixtures and franchises of any railroad company in the state of Ohio, and situated wholly or in part in this state that have been or shall hereafter be sold pursuant to judicial order, judgment, or decree, and which sale has been confirmed by the court making the order of sale, may sell the same, or any portion thereof; and the title thereto with all the rights, liberties, faculties and franchises shall pass by such sale and vest in the purchaser or purchasers thereof, as fully as if the same had been possessed, exercised and enjoyed by such railroad company, and which passed by said judicial sale; which grant, being in the same form

as by law required to pass real estate, shall be recorded in the record of deeds of the county or counties in which said real or personal property situated, and said rights and franchises are or may be exercised.

SEC. 3426*b*. That any railroad company organized or existing under the laws of this state may become the purchasers of such property as provided in the first section (3426*a*) of this act, and any number of persons may become the purchasers of such road, road-beds, rights of way, property and franchises, as provided herein, either directly at such judicial sale or by grant from the purchasers at such sale, whether the same shall have been heretofore or may hereafter be made; and upon filing a copy of said deed or grant in the office of the secretary of state with articles of incorporation executed in accordance with sections *thirty-two hundred and thirty-six and thirty-two hundred and thirty-seven* of the Revised Statutes of Ohio, they and such persons as they may associate with them, not less than five in number, shall become a corporation, with perpetual succession, by such name as they may assume to themselves, with full capacity to maintain and operate such railroads, whether located wholly within this state, or partly within this state and partly within another state or states, and with authority to provide for the purchase price of the railroad and other property so purchased, by the issue of its capital stock, preferred or common, and bonds secured by mortgage or otherwise, bearing interest at a rate not exceeding seven per cent. per annum, and stock and bonds heretofore or hereafter issued as such purchase price, in whatever amounts the incorporators, in good faith, may have agreed on, shall be valid and taken as fully paid for by the transfer to said corporation of such railroad and property, and also by such issue of stock or bonds, to raise the necessary means suitable to improve such railroad property and equipment for the uses and purposes for which it is employed; and in the operation and maintenance of such railroad, the said corporation shall be entitled to all the rights, and be subject to all the obligations and restrictions imposed upon railroad companies by the general laws of this State.

SEC. 3726. The trustees of a college, university, or other institution of learning incorporated for the purpose of promoting education, religion, morality, or the fine arts, which has acquired real or personal property of the value of five thousand dollars, and which has filed in the office of the secretary of state a schedule of the kind and value of such property, verified by the oaths of the trustees, may appoint a president, professors, and tutors, and any other necessary agents and officers, and fix the compensation of each, and may enact such by-laws, not inconsistent with the laws of this state or of the United States, for the government of the institution, and for conducting the affairs of the corporation, as they may deem necessary; and may, on the recommendation of the faculty, confer all such degrees and honors as are conferred by colleges and universities of the United States, and such others having reference to the course of study, and the accomplishments of the students, as they may deem proper.

SEC. 3727. Any university, college or academy, or the trustees

thereof, may hold in trust any property devised, bequeathed or donated to such institution, upon any specific trust consistent with the objects of the corporation.

SEC. 3733. Whenever there occurs a vacancy, in whole or in part, in the board of trustees of an incorporated college, seminary, or academy, by reason of an amendment of the charter in such corporation, or from any other cause, and there is no provision of law for filling such vacancy, the governor shall, within three months after receiving information thereof, appoint the required number of trustees, one-third thereof to serve for one year, one-third to serve for two years, and one-third for three years.

SEC. 3734. A college, university, academy, seminary, or other institution devoted to the promotion of education, now existing by virtue of any special act of incorporation, or organized under the provisions of any law, whose property is derived and held by donation, gift, purchase, devise, or gratuitous subscription, and the amount of which, or the income arising therefrom, is limited by such special act, or by the articles of association adopted by such institution, may receive, acquire, possess and hold hereafter any amount of property, real, personal or mixed, which its board of directors or trustees shall deem it advisable for the institution to accept, and may, by its trustees, sell, dispose of and convey the same, but such property shall not be diverted from the express will of the donor, devisor or subscriber. The board of trustees of any such college, university, academy, seminary, or other institution devoted to the promotion of education, in anticipation of donations to be received and collections to be made, may, for the purpose of constructing, enlarging or adding to any college buildings or improvements, borrow such sum of money as they may determine necessary for such purpose, and may issue bonds therefor and secure the same by a mortgage upon the property upon which such improvement is to be made, provided such property is not held by them under some specific trust.

The following was admitted in evidence on the trial:

EXHIBIT No 6.

Extracts from the Constitution of the State of Ohio.

ARTICLE II.

Legislative.

SECTION 26. All laws of a general nature shall have uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution.

ARTICLE XIII.

Corporations.

SECTION 1. The general assembly shall pass no special act conferring corporate powers.

SEC. 2. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.

The following decisions of the Supreme Court of Ohio, the highest court of that State, were also admitted in evidence:

Platt *v.* Craig, 66 O. S. 75;
State *ex rel. v.* Spellmire, 67 O. S. 77;
Gentsch *v.* State *ex rel.* McGorray, 71 O. S. 151;
Cin. Street R. Co. *v.* Horstman, 72 O. S. 95;
State *ex rel.* Att'y-Gen. *v.* Sherman, 22 O. S. 411;
State *v.* Turnpike Co., 37 O. S. 481;
Bronson *v.* Oberlin, 41 O. S. 476.

The following stipulation was made on the trial and entered on the minutes:

It is stipulated that the Ohio constitution, statutes and decisions admitted in evidence in the above case need not be printed in the case on appeal, but that they, and all other statutes and decisions of the courts of that state that are deemed relevant and material by counsel, be considered as introduced in evidence; and that they may be referred to in the briefs of counsel for any party and considered by the court on appeal to the Appellate Division or Court of Appeals as they appear in the editions of the statutes and reports of that state on file in the library of the Association of the Bar of the City of New York, or the State Library.

The following exhibits were offered in evidence by the Smithsonian Institution and admitted:

EXHIBIT No. 4.

Transcript from the Journals of the Legislature of the State of New York.

1860.

Senate.

* * * * * * *

Jan. 5: Mr. Truman gave notice that he would, at an early day, ask leave to introduce a bill in relation to wills.

(P. 40, lines 11-12.)

Jan. 9: In pursuance of previous notice, Mr. Truman asked and obtained leave to introduce a bill entitled "An act in relation to wills," which was read the first time, and by unanimous consent was also read the second time, and referred to the committee on the judiciary.

(P. 48, lines 28-31.)

Jan. 13: Mr. Hammond, from the committee on the judiciary, to

which was referred the bill entitled "An act in relation to wills," reported in favor of the passage of the same, and said bill was committed to the committee of the whole.

(P. 67, lines 20-23.)

Jan. 18: The Senate again resolved itself into a committee of the whole, and proceeded to the consideration of the general orders, being the bill entitled as follows:

"An act relating to wills."

After some time spent thereon, the President resumed the chair, and Mr. McGraw, from said committee, reported progress, and asked and obtained leave to sit again.

(Pp. 84, lines 49-52 and p. 85, lines 1- .)

Jan. 23: The Senate then resolved itself into a committee of the whole, and proceeded to the consideration of the general orders, being the bills entitled as follows:

"An act in relation to wills."

(Two other bills.)

After some time spent thereon, the President resumed the chair, and Mr. Grant, from said committee, reported progress on the first named bill, and asked and obtained leave to sit again.

(P. 105, lines 13-24.)

Jan. 24: The Senate then resolved itself into a committee of the whole, and proceeded to the consideration of the general orders, being the bills entitled as follows:

"An act in relation to wills."

(Two other bills.)

After some time spent thereon, the President resumed the chair, and Mr. P. P. Murphy, from said committee, reported in favor of the passage of the first named bill, with amendments, which report was agreed to, and said bill ordered engrossed for a third reading.

(P. 111, lines 35-47).

Jan. 25: Mr. Warner, from the committee on engrossed bills, reported as correctly engrossed, the bill entitled as follows:

"An act relating to wills."

(P. 114, lines 11-13.)

Jan. 25: The bill entitled "An act in relation to wills," was read a third time.

The President put the question whether the Senate would agree to the final passage of said bill, and it was decided in the negative, a majority of all the members elected to the Senate not voting in favor thereof, as follows:

For the Affirmative.

Bell	Gardiner	Kelly	J. M. Murphy	Rotch
Blood	Hammond	Lapham	P. P. Murphy	Sessions
Colvin	Hillhouse	Montgomery	Prosser	Warner
Ferry—16.				

For the Negative.

Abell	Lawrence	McGraw	Ramsey	Robertson
Connolly	Grant	Manierre	Richmond	Williams
Fiero	Goss	Munroe—13.		

Mr. Prosser moved to reconsider the vote taken on the passage of said bill, and that that motion lay upon the table.

The President put the question whether the Senate would agree to said motion, and it was decided in the affirmative.

(P. 119, lines 9-27.)

Feb. 8: Mr. Truman moved to take from the table the motion to reconsider the vote on the bill entitled "An act relating to wills."

The President put the question whether the Senate would agree to said motion, and it was decided in the affirmative.

The President then put the question whether the Senate would agree to said motion to reconsider, and it was decided in the affirmative.

Said bill was then read a third time.

The President put the question whether the Senate would agree to the final passage of said bill, and it was decided in the affirmative, a majority of all the members elected to the Senate voting in favor thereof, as follows:

For the Affirmative.

Abell	Gardiner	Kelly	Munroe	Rotch
Bell	Grant	Ketcham	J. M. Murphy	Sessions
Colvin	Hammond	Lawrence	P. P. Murphy	Truman
Connolly	Hillhouse	Montgomery	Prosser	Warner
Ferry—21.				

For the Negative.

Blood	Lapham	Manierre	Richmond	Spinola
Fiero	McGraw	Ramsey	Robertson	Williams
Gross—11.				

Ordered, that the Clerk deliver said bill to the Assembly, and request their concurrence therein.

(P. 202, lines 10-33.)

Apr. 12: A message from the Assembly was received, informing that they had concurred in the passage of the bill entitled "An act relating to wills," with the following amendments:

Section 1, line 5, engrossed bill, strike out the word "fourth" and insert in lieu thereof the word "half."

Line 8, same section, strike out "fourth" and insert "half," and after the word "more" strike out the balance of the section.

Mr. Truman moved that the Senate concur in said amendments.

The President put the question whether the Senate would agree to said motion, and it was decided in the affirmative, as follows:

For the Affirmative.

Colvin	Fiero	McGraw	J. M. Murphy	Rotch
Blood	Goss	Manierre	Prosser	Spinola
Bell	Hammond	Montgomery	Ramsey	Truman
Abell	Ketcham	Munroe	Richmond	Warner
Connolly—21.				

Ordered, that the Clerk return said bill to the Assembly, with a message informing that the Senate have concurred in their amendments.

(P. 809, lines 17-35.)

Apr. 13: A message from the Assembly was received, returning the following entitled bill:

"An act relating to wills."

Ordered, That the Clerk deliver said bill to the Governor.

(P. 845, lines 31-34.)

Apr. 16: A message was received and read, from His Excellency the Governor, by the hands of his Private Secretary, in the words following, to-wit:

ALBANY, *April* 16, 1860.

To the Senate: I approved the bills bearing the following titles, at the dates respectively named, to-wit:

(21 bills mentioned; then)

April 13: "An act relating to wills."

(Follows a list of other bills signed)

E. D. MORGAN.

(From line 17, page 920 to line 39, page 924.)

* * * * * * *

Assembly.

Feb. 9: A message from the Senate was received and read, requesting the concurrence of the Assembly to the bills entitled as follows:

"An act relating to wills," which was read the first time, and by unanimous consent was also read the second time, and referred to the committee on the judiciary.

(P. 323, lines 14-18.)

Feb. 11: Mr. Robinson, from the committee on the judiciary, to which was referred the Senate bill entitled "An act relating to wills," reported in favor of the passage of the same; which report was agreed to, and said bill committed to the committee of the whole.

(P. 355, lines 49-50.)

(P. 356, lines 1-2.)

Apr. 3: Mr. Payne, from the select committee of nine, reported the following entitled bills as proper to be referred to select committees, to report complete, to-wit:

Senate bill, general order 216, "An act relating to wills." With amendments recommended, to strike out the limitation of $10,000, also, the limit as to time previous to death when a will can be made and be valid.

(Follow titles of other bills.)

Ordered, That said report be laid on the table.

(P. 956, lines 49-51.)

(P. 957 and 958, to line 26, inclusive.)

Apr. 5: Mr. Speaker announced the following select committees on the bills entitled as follows:

"An act relating to wills," Messrs. Barnett, Emerick, Hubbell, Maxson and Varian.

(P. 1016, lines 39-42.)

Apr. 6: Mr. Barnett, from the select committee consisting of Messrs. Barnett, Emerick, Hubbell, Maxson and Varian, to which was referred the Senate bill entitled, "An act relating to wills," with power to report complete, reported the same complete, with amendments; which report was agreed to, and said bill ordered to a third reading.

(P. 1049, lines 45-50.)

Apr. 11: The Senate bill entitled, "An act relating to wills," was read a third time.

Mr. Speaker put the question whether the House would agree to the final passage of said bill, and it was determined in the affirmative, a majority of all the members elected to the Assembly voting in favor thereof.

(Ayes 77.)

(Noes 13.)

Those who voted in the affirmative, are

Arcularius	Decker	Hoskins	Merritt	Slingerland
Barden	Dorsch	Hough	Miller	H. Smith
Burns	Downs	Hubbell	Morgan	J. M. Smith
Bush	Dwight	Jakway	Moulton	Speaker
Cadwell	Earll	Jaques	A. Myers	Stilson
Callicot	Ellsworth	Jeffords	O'Rorke	Van Alstyne
Carter	Emerick	Jennings	Palmer	Van Horn
J. Clark	Evans	Jewell	Payne	Varian
Chittenden	Finch	Jewett	Pond	Vermilye
P. Clark	Fisher	R. S. Kelsey	Powell	Walsh
Coleman	Gibbs	Kennedy	Richardson	Webster
Cooper	Gover	Kortright	Rider	Whipple
Couchman	Gray	Masterson	Robinson	Williams
Crane	Hall	Mather	Searles	Woodruff
Crocker	Harris	Maxson	Servis	Yeury
Culver	Holcomb			

Those who voted in the negative are:

B. Allen	Conkling	McArthur	Pettit	A. Smith
O. Allen	Cook	McFadden	Plumb	Wiley
Beebe	Flagler	McQuade		

Ordered, That the Clerk return said bill to the Senate, with a message informing that the Assembly have passed the same, with amendments.

(P. 1173, lines 23-54.)

Apr. 16: A message was received from the Governor, through his private secretary, in the words following, to-wit:

ALBANY, *April* 16, 1860.

To the Assembly:

I approved the bills bearing the following titles, at the dates respectively named, to-wit:

(21 bills enumerated.)

April 13.—"An act relating to wills."

(Follows a list of other bills signed.)

E. D. MORGAN.

(P. 1333, line 3 to p. 1337, line 20.)

This is to certify that the annexed is a true and correct transcript from a printed copy of the Journals of the Senate and Assembly of the State of New York at their eighty-third sessions, begun and held at the Capitol in the City of Albany on the 3rd day of January, 1860, and now on file, pursuant to law, in the New York State Library, a department of the University of the State of New York, and that I have compared said transcript with said printed copy of said journal and find the same to be a true and correct transcript therefrom and of all parts thereof relating to the proceedings respecting the bill introduced as Senate Bill No. 15 and entitled, "An Act relating to Wills."

In testimony whereof, the seal of the University of the State of New York has been affixed at the City of Albany, this 6th day of June, 1905.

[SEAL.]

A. S. DRAPER,
Commissioner of Education.

EXHIBIT No. 5.

STATE OF NEW YORK:

No. 15, in Senate.

JANUARY 9, 1860.

Introduced on notice by Mr. Truman—read twice and referred to the committee on the judiciary—reported favorably from said committee, and committed to the committee of the whole.

An Act Relating to Wills.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. No person, leaving a wife, child, or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-fourth part of his or her estate, after the payment of his or her debts, (and such devise or bequest shall be valid to the extent of one-fourth, and no more,) and no such devise or bequest shall be valid in any will and testament which shall not have been made and executed at least two months before the death of the testator.

§ 2. All laws and parts of laws inconsistent with this act, are hereby repealed.

(Senate, No. 15.)
(I. 16, G. O. 16.)

This is to certify that I have compared the annexed with the original thereof, on file in the New York State Library, a department of the University of the State of New York, and that it is a true and correct copy of Senate Bill No. 15 of the session of the Senate of the State of New York, and of the whole of said bill.

In testimony whereof, the seal of the University of the State of New York has been affixed at the city of Albany, this fifteenth day of February 1904.

[SEAL.] J. R. PARSONS, JR., *Secretary.*

The following was introduced in evidence by the plaintiff and admitted.

[Title.]

COUNTY OF NEW YORK, *ss:*

James W. Hawes, being duly sworn, says:

That he is the attorney for the plaintiff in the above entitled action. That he has made investigations and inquiries in the office of the Secretary of State at Albany and in the State Library in that City, and from such investigations and inquiries he states, on information and belief, that the original journals of the Senate and Assembly for the year 1860 are not in existence, nor are there in existence either manuscript or printed copies of the bills introduced in either house in any state of the progress of such bills, except printed copies of the bills as originally introduced; that there are no official reports of the debates in either house during that year; that the only existing records and reports of the proceedings of the legislature of that year in either house are the printed journals of the two houses and the reports that may have been published in the newspapers of the period.

That annexed hereto and marked "A" and "B" respectively are correct copies of so much of the reports of the legislative proceedings appearing during that year in the "Atlas and Argus," a morning daily newspaper published in the City of Albany, and in the "Albany Evening Journal," an evening daily newspaper published in said City, as show any debate upon the bill entitled "An act relating to wills," or any details of any amendment thereof. That such copies were made from the said newspapers on file in the State Library in the City of Albany, at the request of deponent, who compared the same with the said newspapers so on file.

JAMES W. HAWES.

Sworn to before me this 21st day of July, 1905.

LUKE VINCENT LOCKWOOD,
Notary Public, Kings Co.

Certificate filed in N. Y. county.

A.

Atlas & Argus, Thursday Morning, January 19, 1860.

Legislature of New York.

(Reported for the Daily Atlas & Argus.)

In Senate, Tuesday, January 17.

Mr. McGraw in the chair—The Committee of the Whole took up the bill relative to wills.

This bill provides that no person, dying and leaving a wife or children or parents, shall devise more than one-fourth of his estate, after the payment of his just debts, to any charitable, religious, scientific, literary or other association.

Mr. Lawrence asked for an explanation of the bill.

Mr. Truman briefly rehearsed the provisions of the measure.

Mr. Spinola moved to strike out the enacting clause.

Mr. Hammond hoped the motion would not prevail. He believed the bill to be right. It might be urged that it was a proposed interference with the free transmission of property. He did not consider it in that light. It sometimes occurs that a man on his death bed, anxious to atone for his grasping avarice through life, and for his neglect of all charities, or for the purpose of buying fame, bequeaths his entire estate to some institution or society, leaving his family destitute and in want. The power to do this, he thought, ought to be limited. He was opposed to this *post mortem* liberality or method of buying fame after a life of grasping avarice.

Mr. Spinola remarked that he had not anticipated that this measure would be called up today, and he was not prepared to discuss it now. He would, therefore move to report progress—taking this opportunity to say that he was emphatically opposed to the principle involved. It was not right—it could not be right—for the Legislature to interfere with the individual in the disposal of private property, generally acquired by himself through a life of industry, if not of self-denial.

Mr. Goss hoped the motion to report progress, would prevail. This was really a very important bill, involving, perhaps, constitutional questions. It would be well for Senators to inquire, before proceeding further, whether this proposition is not an unjustifiable interference with the constitutional rights of citizens.

Mr. Grant remarked that upon first glance at the bill he was disposed to consider it favorably, but after the brief remarks of Senators, he would prefer to have more time for its consideration. If it be a correct assumption, indulged in by some men on their death beds (as intimated by the Senator from the 27th), that bequests to charitable or such like institutions secures fame and Heaven at the same time, it were best, perhaps, not to disturb the present law.

The motion to report progress prevailed, and the Senate adjourned.

Atlas & Argus, January 24, 1860.

Legislature of New York.

(Reported for the Daily Atlas & Argus.)

In Senate Monday, January 23—7 p. m.

Mr. Grant in the chair. The Committee of the Whole took up the Bill relative to Wills. (The bill provides that no person, leaving a wife, parents or children, shall bequeath to any charitable or other institution more than one-fourth of his estate.)

Mr. P. P. Murphy moved to amend by instituting the word "husband" before wife. (Carried.)

Mr. Sessions moved to add—"but no property shall be devised as aforesaid unless the property of the testator shall exceed in value the sum of $10,000."

Mr. Truman then moved that the bill be reported complete.

Mr. Goss hoped the motion would not prevail at present. The bill involved several very important questions, and it was not clear but that it conflicted with the Constitution. This sort of interference with the private affairs, property and rights of individuals ought not to be tolerated—certainly not until the fullest discussion has been permitted.

Mr. Hammond could not see that this bill interfered with the constitutional rights of the individual. Nor did he conceive that it interfered with the rights of man. The world is wide and there are many opportunities for the individual to exercise all his liberality. He may give what he pleases for the advancement of religion, or the benefit of the poor. This bill will not interpose the lease obstacle. What it provides for is that the man, on his death bed, after a life of grasping avarice, shall not, in the hope of purchasing happiness hereafter, be permitted to beggar those whose claims upon him are strongest. The evils attending this *post mortem* benevolence must be apparent. It has been felt in every old country, but especially in Mexico. This bill simply provides that the individual, if he is charitably disposed, shall dispense his charity while he lives, when his senses are in their fullest vigor, and not (to the serious detriment of his family) when in the grasp of death, and, perhaps, the victim of fear.

Mr. Ramsey hoped the motion to report complete, would not prevail. He could see no good reason why a will, if not made two months before death, shall be declared invalid, so far as any bequest to charitable institutions is concerned. There was no justice in this.—You might as well declare every will invalid, that is not made two months before death. He believed the policy of the bill wrong. It was an invasion upon the rights of the individual, one that directly conflicted with the spirit of our government. It was not called for by any public or private necessity, and he could conceive no good argument for its adoption. He moved to amend—that the committee report progress. (Carried.)

Atlas & Argus, January 25, 1860.

Legislature of New York.

(Reported for Atlas & Argus.)

In Senate Tuesday Jan. 24.

Mr. P. P. Murphy in the chair. The Committee of the Whole resumed the consideration of the bill relative to Wills.

Mr. Truman moved that the bill be reported complete. (Carried 11 to 10.)

B.

[Extracts from the Albany Evening Journal to substantially the same effect.]

Opinion of Mr. Justice Dowling at Special Term.

DOWLING, *J.*:

Without entering into the details of the evidence in this case, which has been so thoroughly discussed by counsel in their exhaustive briefs upon which have been cited practically every known case upon the question of presumption of survivorship in a common or other disaster, it will be sufficient to indicate the conclusions arrived at as to the material issues herein. I do not deem the questions in controversy such as to call for any unusual quality of proof. The issue of survivorship as between those perishing at about the same time calls for the best evidence of which the case in its nature is susceptible, and while mere guess work or speculation is not enough to predicate a finding upon, yet when every fact and circumstance of which the nature of the case permits has been laid before the Court, it is bound to apply to the situation the ordinary rules of proof and weigh the evidence as in any other case. I find as a fact satisfactorily established from the evidence, that Mrs. Georgie Boyden St. John survived Wallace C. Andrews and his wife, having been rescued from the building No. 2 East 67th street while living, and thereafter dying. I am further satisfied from the evidence that while Wallace C. Andrews and his wife pre-deceased Georgie Boyden St. John it is impossible to find from any evidence in the case, whether or not Andrews did or did not survive his wife, and that the question of survivorship as between these two latter is not susceptible either of proof or of determination.

In so far as the application of Chapter 360, Laws of 1860, to the will in question is concerned, I am of the opinion that the words "having a husband, wife, child or parent" mean and are the equivalents of "leaving a husband, wife, child or parent." The will speaks from the time of decedent's death; the other qualifications of a testator's right to dispose of more than one-half of his estate to charity confessedly refer to the time of his decease, *i. e.* the amount of the total estate, and the amount of his debts to be deducted therefrom to

arrive at its net value. Down to and including the recent case of Robb *vs.* Washington and Jefferson College, 103 App. Div., 327, the word "having" in this connection has been uniformly construed to mean "leaving." Decedent's will was duly admitted to probate; the heirs and next of kin are seeking to show that testator violated the provisions of the act in question by disposing of more than one-half of his estate to charity. The burden of proof is upon them to establish that testator was one of the class forbidden to dispose of more than one-half of his net estate by will, having left a widow. This they confessedly are unable to establish. The statute therefore does not apply.

The accumulation of income pending the incorporation of The Andrews Institute for Girls being accidental and arising *ex necessitate rei*, and not by direction of testator, is not in violation of the Statute; and the intention of the testator being plain that the corporation should take as soon as his wife was dead if she survived him or at his own death if she did not survive him, I do not believe that any accidental or other delay in incorporating the body corporate which was to take under testator's will should operate to deprive it of the accumulated income.

As to the validity of the Act of the Ohio legislature under which The Andrews Institute for Girls was formed, it is not the province of the Courts of this State to question collaterally the credit to be given to the enactment of another state. If this act is repugnant to the Constitution of the State of Ohio, as claimed, the forum in which to test that question is an Ohio tribunal having authority to construe and determine the force to be given the legislation of its own law making power.

The power of sale under the will being imperative, the will worked a conversion of the real estate into personalty as of the time of testator's death.

Having indicated my views upon the legal rights of the parties hereto, I believe judgment should be entered accordingly, but that the accounting for, and distribution of this estate should be had in the Surrogate's Court of this County, where an appropriate proceeding for that purpose is now pending.

Findings settled and filed—settle judgment on notice.

On appeal of the Smithsonian Institution and certain next of kin, this judgment was unanimously affirmed by the Appellate Division of the Supreme Court April 10, 1907.

Opinion of the Appellate Division, First Department.

Per LAUGHLIN, *J.*:

This is an action by the executor of and trustee under the last will and testament of Wallace C. Andrews, deceased, for a construction of the will of his testator. The will was executed on the 12th day of November, 1891, and the testator died in the City of New York on the 7th day of April, 1899, leaving real property in the States of New York, New Jersey and Virginia, and certain personal property. At the time he executed the will he had a wife living, and he desig-

nated her as an executrix of his will, but she perished with him in the destruction of her house, No. 2 East 67th street, New York, where they resided, by fire; and the trial Court was unable to decide on the evidence whether she predeceased or survived him. The will was duly admitted to probate, as one competent to pass both real and personal property, by the Surrogate of the County of New York on the 22nd day of May, 1899. Letters testamentary were issued to the plaintiff as sole surviving executor, on the 23rd day of May, 1899, and he qualified and has ever since acted as executor and trustee under the will. The legatees, heirs, next of kin and the Attorney General—the latter in accordance with the requirements of Chapter 701 of the Laws of 1893—were made parties defendant.

The testator left no child, grandchild or parent him surviving. In the first clause of the will he provided for the payment of his debts, funeral expenses and the cost of administration and certain specific legacies, depending on the value of his estate, to two sisters; and in the second clause devised the rest, residue and remainder of his estate to his executors in trust, to collect the rents and income and pay the same over to his wife for life. Upon her death, he by the third clause, devised $500,000, if the estate should exceed that sum, and if not, all the residue, one-fourth to each of two sisters, an eighth to another sister, an eighth to a niece, an eighth to Gamaliel C. St. John, brother to his wife, whom he appointed his executor, and an eighth to the wife of St. John; and by the fourth clause, *"upon the death"* of his wife, he devised and bequeathed to the corporation hereinafter directed to be formed, all the excess and residue of his estate over the sum of $500,000 thereinbefore devised, as already stated. He, then in the fifth clause, provided for the formation of a corporation under the Laws of Ohio by his executors, to take the bequest; and in the succeeding clause of the will provided that in the event that his wife should predecease him, the bequest to the Ohio corporation to be created "shall take effect upon my death." The executor, in fulfillment of the directions of the testator contained in the will, procured the incorporation of The Andrews Institute for Girls under the Laws of Ohio on the 13th day of May, 1902, and the corporation organized and accepted the gift on the 29th of the same month.

The legacies to Mr. and Mrs. St. John have not been paid. The residuary estate has not been distributed. Its value is about one million, three hundred thousand dollars, and it is more than one-half of his entire estate. The testator further provided in the will that, should the bequest to the corporation to be formed under the Laws of Ohio "because of illegality fail, or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution * * * to be devoted to the purposes for which it was established." Georgie Boyden St. John, the wife of Gamaliel C. St. John, was also in the fire, and although rescued alive, died soon after, in consequence thereof.

[Here the learned Judge discusses the facts relating to survivorship, concluding that Mrs. St. John survived the testator.]

The learned counsel for the next of kin and *and* heirs at law,

while insisting that no finding of survivorship is warranted as between the testator and his wife and Mrs. St. John, yet contends that if the court should decide otherwise, then it should have been found that Mrs. Andrews survived her husband and that the residuary bequest either to the Ohio corporation or the Smithsonian Institution would be void as to one-half, for it would be in violation of Chapter 360 of the Laws of 1860 which provides as follows:

"No person having a husband, wife, child or parent shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half and no more)."

The preponderance of the evidence shows that the body of Mrs. Andrews, so burned that it fell apart, was found in the hallway on the second floor a few feet from the door of her room, although there is evidence that it was found on the first floor at the foot of the main stairway. There is no other evidence shedding any light on the time of her death. On this point, under the rule already stated, for the purpose of determining property rights, it would have to be assumed that she and her husband died at the same time. If they died at the same time, then the testator could not be said to have left a wife him surviving. If therefore the statute only prohibits such gifts when the testator leaves a wife surviving him, then the burden was upon the next of kin to establish that fact, for upon it their right to participate, if they could participate in any event, depended. (Garvey *v.* Union Trust Co., 29 App. Div., 513; Garvey *v.* U. S. Fid. & Guar. Co., 77 *id.*, 391. See also Gallagher *v.* Crooks, 132 N. Y., 338; City of Cohoes *v.* D. & H. C. Co., 134 *id.*, 397). There being no evidence to justify a finding that the wife survived her husband, as to Mr. and Mrs. Andrews, the case falls within the general rule applicable to deaths in a common disaster. It is contended, however, that the scope of the statute is not confined to cases where a husband leaves a wife surviving, but that the will is invalid as to such bequest if the testator have a wife living at the time he makes the will. It is now well settled that a bequest or devise in violation of this statute is void and may be taken advantage of by others than those enumerated in the Act of 1860; and consequently the heirs or next of kin have a standing in court to be heard on the question (Robb *v.* Washington & Jefferson College, 103 App. Div., 327; affd. 185 N. Y. 485). It is claimed that there is no authoritative decision on the precise point now presented; but I think the courts have considered that the validity of such bequests depends on survivorship of one of those enumerated in the Act (see Robb *v.* Washington & Jefferson College, *supra;* Amherst College *v.* Ritch, 151 N. Y. 282, 334; Matter of Walker, 136 *id.*, 20, 26). A will takes effect not at the time of its execution, but on the death of the testator and its validity and construction depend not upon the law at the time of its execution, but at the date of his death (Parker *v.* Bogardus, 5 N. Y., 309; Doubleday *v.* Newton, 27 Barb. 431; Moul-

trie *v.* Hunt, 23 N. Y., 394). The purpose of the statute was not to disqualify the beneficiary from taking, nor to prohibit a husband from *making* a will containing such a disposition of property, but to provide that in case a testator should die leaving such a survivor and leaving more than one-half of his estate to such charitable use, the bequest should be void except to the extent authorized by the statute. The object of the Legislature was not to compel a testator to make provision for his wife and family, but to admonish him of their claims upon his bounty and to invalidate in part such a disposition of property in the event of his leaving his wife, child or parent him surviving (Chamberlain *v.* Chamberlain, 43 N. Y., 424,; Allen *v.* Stevens, *id.*, 122; Hollis *v.* Drew Theolog. Sem., 95 *id.*, 166). No other construction of the statute would be reasonable. If the word "having" therein is to be construed as relating to the time of making the will, then the statute would have no application to marriages subsequent to the making of the will. A testator at the time of making a will seldom knows the value of the estate which he will leave. If the statute refers to the family status at the time of making the will, it must refer to his property status at that time also—which clearly it does not. The application of the statute depends upon an inquiry with respect to the value of the estate *left;* and it is the reasonable construction that the word "having" should be "leaving" him surviving.

In the view we take of the construction of the statute of 1860, it becomes unnecessary to decide the conflicting contentions of the next of kin and the Smithsonian Institution, with respect to the ownership of that part of the residuary fund which could not be bequeathed to a charitable use, under the provisions of that statute, if applicable; and with respect to the claims of the Smithsonian Institution, that if the Andrews Institute for girls could not take all the residue, it could not take any.

The Smithsonian Institution further claims that the bequest to the Ohio corporation to be formed failed because the testator intended the bequest to vest immediately upon the death of his wife, if at all, and that since she did not survive him, it became a gift *in praesenti,* at his death, and the corporation not being then *in esse,* the bequest failed and the property vested in it, under the alternative clause of the will. The trial court found that the Andrews Institute for girls takes all the residue and that neither the Smithsonian Institution nor the heirs or next of kin take anything. Mrs. Andrews was much younger than her husband, and doubtless he contemplated her surviving him many years. He made bountiful provision for her support during life, and then made liberal bequests to those of his relatives whom he regarded as worthy of his bounty, and intended that the residue of his property, no matter how much or how little, should be used "for the purpose of establishing an institution" in the town of Willoughby, Lake County, Ohio, upon a farm owned by his wife and formerly owned by him, and if that should not be available, "then on other suitable premises" in said town "for the free education of girls and for their support in proper cases during education, with a special view toward render-

ing them self-supporting." He specified the subjects upon which instruction should be imparted to the girls, and gave directions with respect to the erection of a suitable building and maintenance of the institution, and then directed that the charter of the corporation should provide "if and so far as may be consistent with law and practicable" that the corporation should be managed by a board of five directors, consisting of the Governor of the state, the Member of Congress for that District, the Treasurer of that County, and the Mayor of Willoughby, and their successors in office, and his brother-in-law St. John, whose successor should be a resident of the town selected by the Governor. The direction with respect to the formation of the corporation was as follows: "I direct my executor and executrix as soon as practicable after my decease and during the lives of my said wife and her said brother, or the life of the longest liver of them, to procure under the laws of the State of Ohio, an incorporation to be formed, with the powers specified. It is to be observed that it was only in the event that his primary desire to endow the Ohio corporation could not be lawfully accomplished, that he intended that the bequest should go to the Smithsonian Institution. The policy of the law favors upholding charitable bequests, whether they are to be administered at home or abroad, and if to be administered abroad, the right of the foreign legatee to take will be determined by our courts before directing the executors to turn over the fund, but under the law of the foreign jurisdiction and unaffected by our laws relating to accumulations and perpetuities (Matter of Huss, 126 N. Y., 537; Amherst College *v.* Ritch, 151 *id.*, 182; Hollis *v.* Drew Theolog. Sem., 95 *id.*, 166; Hope *v.* Brewer, 136 *id.*, 126; Cong. Unitarian Soc., *v.* Hale, 29 App. Div., 396; Matter of Sturgis, 164 N. Y., 485; Robb *v.* Wash. & Jef. Col., *supra*). The charity which the testator was desirous of establishing in Ohio was commendable, and the court should not be astute to discover legal objections to giving effect to his intention. The will does not, as claimed by the counsel for the Smithsonian Institution, show that the testator did not intend that the Ohio corporation should take if not formed before the death of his wife. He provided in effect that it might be formed by the other executor and trustee, should it not be formed before her death, and he expressly provided that it should take the bequest even though she predeceased him. There is no force in the argument that this was merely a restriction or limitation as to the period within which the corporation *must* be formed, or that it does not carry with it either expressly or by implication permission to form it after the death of his wife. His intention thus clearly manifested and public policy demand that the Andrews Institute, which his executor caused to be incoporated pursuant to his command, and which fulfils in all respects his purpose, shall receive the bequest if consistent with the rules of law (Amherst College *v.* Ritch, 151 N. Y., 282; Dammert *v.* Osborn, 140 *id.*, 30). The will is susceptible of the construction that the bequest was to vest in the corporation, if *in esse*, upon the death of his wife, but if not then *in esse*, that it was to vest in it when formed by the trustee who survived his wife, and in such a case a *present* bequest is

not to be presumed, and if a construction that the bequest was to vest in the corporation when formed would render it valid, that construction should prevail (Burrill *v.* Boardman, 43 N. Y., 258; Robb *v.* Wash. & Jef. Col., *supra;* People *v.* Simonson, 126 N. Y., 299). If we should construe the will as indicating an intent on the part of the testator that the bequest was to vest on his own death if his wife predeceased him, and on her death if she survived him, even though the corporation had not then been formed, it would doubtless, unless sustainable under Chap. 701 of the Laws of 1893, be void since the beneficiary was not then *in esse* and in that view would have been incapable of taking, and its subsequent incorporation would not avail it (Booth *v.* Baptist Church, 126 N. Y., 215; White *v.* Howard, 46 *id.*, 144; see also Murry *v.* Miller, No. 1, 85 App. Div. 414). The corporation was required to be formed within two lives in being and in the case of bequests for charitable use, the law without regard to whether Chapter 701 of the Laws of 1893 applies or not, permits the suspension of ownership and the power of alienation during a period necessary to form a corporation, not exceeding two lives in being at the death of the testator, to take the bequest which in such circumstances is valid as an executory devise or bequest (Tilden *v.* Green, 130 N. Y., 29; Burrill *v.* Boardman, 43, 254; Inglis *v.* Trustees of Sailor's Snug Harbour, 3 Pet., 99; Shipman *v.* Rollins, 98 N. Y., 311). In the case at bar it was impossible to form the corporation pursuant to the will before her death.

The learned counsel for the Smithsonian Institution also contends that the Andrews Institute for girls was not legally incorporated and, therefore, cannot take the bequest. It is not claimed that the *regularity* of the incorporation or organization can be questioned collaterally, as clearly it cannot; but it is insisted that the corporation may be shown to have no legal existence because incorporated in violation of the constitution of that state. Owing to the provisions with respect to the management of the corporation by a board of five trustees, four of whom were to be officials, it was deemed advisable to apply to the Legislature for the enactment of a general law under which the corporation could be formed. The Act was passed on the 19th day of March, 1902. It contains no specific reference to this will or to the bequest to the Ohio corporation to be formed. The title of the Act, "An Act to provide for the administration of charitable trusts in certain cases," is general, and the Act is general in terms and relates to devises and bequests for charitable uses, "or for the establishment and maintenance of any industrial or educational school or institution to be located at any place within this state," theretofore or thereafter made, and provides for the formation of a corporation by the executor and officials designated in the will, referring to wills providing for the management of the corporation by a board of trustees or directors consisting in part of the officials of the state and of the county, municipal corporation, and member of Congress for the District in which the charity is to be administered or institution or school is to be located. The Andrews Institution was thereafter incorporated by filing a certificate of incorpo-

ration which does not specify and was not required to specify the particular statute or statutes under which it was filed. Many general statutes of the state are cited from which it is claimed authority for the incorporation exists, with the possible exception of the management of the corporation by such officials, and this statute of March 19th is relied upon as authority for the corporation in that regard. The contention is that the statute is in contravention of section 1 of article 13 of the Constitution of Ohio, which provides that "the general assembly shall pass no special act conferring corporate powers" It is quite likely that the corporation could be sustained under other statutes, even if the provisions of the Act of March 19, 1902, with respect to the composition of the board of trustees should be declared invalid (see Bates An. Ohio Stat. † §§ 3235, 3236, 3238, 3726, 3727, 3734; *id.* § 4015-67 *et seq.*, p 2279 § 1 *et seq.*, 53 O. L. 33 § 1 *et seq.*) These statutes among other things authorize the formation of a corporation for any purpose for which individuals may lawfully join except for carrying on professional business, and provide for filling vacancies in the board of trustees from any cause, and for the management of schools or academies receiving bequests and devises by the Court of Common Pleas where the management is not otherwise provided for and for the execution of the trusts upon which the property was bequeathed or devised. Nor does the argument that this is a special act in violation of the Constitution seem tenable (State *ex rel. v.* Spellmire, 67 Ohio St. 86). It is exceedingly doubtful whether in the event we would be justified in refusing to allow the Andrews Institute to take this bequest upon the theory that it has no corporate existence, when, so far as appears, it is recognized by the state and no proceeding has been taken to have its charter either annulled or forfeited (State *v.* Gardner, 54 Ohio St. 24; Baltholomew *v.* Bentley, 1 *id.*, 37; Trustees of Vernon Society *v.* Hills, 6 Cow. 23; Lamming *v.* Galusha, 81 Hun, 247; Cooley Const. Lim., 5th ed. 311; Cook Corp. 5th ed. § 637; Thomp Corp. § 501; Coast Co. *v.* Spring Lake, 56 N. J. Eq. 6115; Merrick *v.* Van Santvoord, 34 N. Y., 208; U. S. Vinegar Co. *v.* Schlegel 143 *id.*, 537). Under the authority to determine whether the legatee is competent to take the legacy, we of course are authority to determine whether the legatee is competent to take the legacy, we of course are authorized to determine the extent of the corporate authority, but the corporate existence is quite another thing. While I think the Andrews Institute was legally incorporated, it is at least a *de facto* corporation acting under color of law, and apparently recognized by the state under whose laws it has sprung into existence and with little likelihood of its corporate existence being drawn in question.

[Here the learned Judge discusses the question of the income accruing between the death of the testator and the incorporation of the Andrews Institute for Girls.]

It follows that the judgment should be affirmed, with separate bills of costs to all parties separately appearing to be paid out of the estate.

All concur.

The cause having been appealed to the Court of Appeals by the

Smithsonian Institution and certain next of kin, the following amended remittitur embodying the decision of that court was sent down and filed.

COURT OF APPEALS,
State of New York. ss:

Pleas in the Court of Appeals held at the Capitol, in the City of Albany, on the 25th day of February in the year of our Lord one thousand nine hundred and eight, before the Judges of said Court.

Witness, The Hon. Edgar M. Cullen, Chief Judge, Presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, February 26th, 1908.
Amended Remittitur June 16, 1908.

GAMALIEL C. ST. JOHN, as Executor, etc., Respondent,
ag'st
THE ANDREWS INSTITUTE FOR GIRLS and Others, Respondents, and
SMITHSONIAN INSTITUTION and Others, Appellants.

Be it remembered, That on the 20th day of July in the year of our Lord one thousand nine hundred and seven, Norman C. Andrews and others, Smithsonian Institution and another, and Edith A. Logan, the appellants in this action, came here into the Court of Appeals, by Nathan, Leventritt & Perham; Wetmore & Jenner and Henry M. Earle, their attorneys, and filed in the said Court notices of appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Gamaliel C. St. John, as executor &c., Andrews Institute for Girls, Gamaliel C. St. John, individually, &c., the respondents in said action, and Hon. William S. Jackson, Atty. Genl., afterwards appeared in said Court of Appeals by James W. Hawes, Henry Wollman and Herbert H. Gibbs, their attorneys. Which said notices of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Messrs. Harold Nathan, Edmund Wetmore, and Frank W. Hackett, of counsel for the appellants, and by Messrs. John D. Lynn, Henry Wollman, Virgil P. Kline, Herbert H. Gibbs and James W. Hawes, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division and Special Term of the Supreme Court appealed from herein be, and the same hereby are, modified so as to award to each of the next of kin of the deceased who have appealed from the judgment of the Special Term herein and from the judgment of the Appellate Division herein affirming said judgment of the Special Term, his proportionate share of the income from the rest and residue of the estate from the date of the death of the testator to the date of the incorporation of the Andrews Institute and as modified affirmed

as the parties to this appeal, with costs to all the parties appearing in this Court and filing briefs, payable out of the principal fund.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Amended June 16, 1908, in accordance with order of June 12, 1908.

R. M. BARBER, *Dep. Clerk.*

Therefore, it is considered that the said judgments be modified, &c. &c., and as modified affirmed, with costs &c. &c. as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the Judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justice thereof, &c.

R. M. BARBER,
Dep. Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE.
ALBANY, *June 16th*, 1908.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein attached thereto.

[Seal of Ct. of Appeals.]

R. M. BARBER,
Dep. Clerk.

Upon this remittitur the following judgment was entered by the Supreme Court:

[Title.]

The defendants Norman C. Andrews, Emma H. Andrews, Volney Rogers, as ancillary administrator of the goods, chattels and credits of Lawrence G. Andrews, deceased, Julia A. Bruce, Edith A. Logan, Smithsonian Institution, and Melville W. Fuller, as Chancellor of the Smithsonian Institution, having appealed to the Court of Appeals from the judgment herein entered upon the determination of the Appellate Division of the Supreme Court for the First Judicial Department in the office of the Clerk of the County of New York on the 12th day of April, 1907, affirming the judgment herein entered in the office of the Clerk of the County of New York on the 25th day of January, 1906, and also from the order on which said judgment was based entered in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department, on the 6th day of April, 1907, and the Court of Appeals having modified the judgments of the Appellate Division and Special Term of the Supreme

Court appealed from, and as modified having affirmed the same, as specified in its remittitur, and the remittitur from the Court of Appeals having been duly filed in this Court, and the order and judgment of the Court of Appeals having been made, by order duly entered, the order and judgment of this court, and the costs of the respective parties having been adjusted by the clerk at the sums hereinafter named, it is, on motion of James W. Hawes, attorney for the plaintiff,

Adjudged that the said judgments of the Appellate Division and Special Term of this court, so appealed from to the Court of Appeals, be and the same hereby are modified so as to award to each of the next of kin of the deceased who appealed from the judgment of the Special Term herein and from the judgment of the Appellate Division herein affirming said judgment of the Special Term (to wit, Norman C. Andrews, Emma H. Andrews, Julia A. Bruce, Edith A. Logan, and Volney Rogers, as ancillary administrator of the goods, chattels and credits of Lawrence G. Andrews, deceased) his proportionate share of the income from the rest and residue of the estate from the date of the death of the testator to the date of the incorporation of The Andrews Institute for Girls, and as modified affirmed as to the parties to the appeal to the Court of Appeals with costs to all the parties appearing in the Court of Appeals and filing briefs, payable out of the principal fund.

[Amount of costs.]

Dated June 26th, 1908.

PETER J. DOOLING, *Clerk.*

Opinion of Court of Appeals.

CHASE, *J.:*

Wallace C. Andrews made his will November 12, 1891. He died April 7th, 1899, a resident of the county and state of New York, where his will was duly probated on the 22nd day of May, 1899, and letters testamentary were thereupon issued to the plaintiff. This action is brought to procure a construction of said will and to have the rights of the parties thereunder declared. The judgment rendered herein at the Special Term has been unanimously affirmed by the Appellate Division, and there is no contention in this court about the facts as found at the Special Term.

The testator by his will gives certain general legacies. He then gives all the rest and residue of his estate to his executor and executrix in trust "to collect and receive the rents, issues, income and profits thereof and pay them over from time to time to my (his) wife * * * for her own use for and during her natural life and upon her death to dispose of my (his) said residuary estate as hereinafter (thereinafter) provided."

Upon the death of his wife he devised and bequeathed the sum of five hundred thousand dollars if his estate should exceed that sum, and if it should not exceed that sum, then his entire estate as by his will specifically directed. The following five paragraphs of the will are each important in the consideration of the questions which we will herein discuss, viz.:

"*Fourth.* Upon the death of my said wife, I devise and bequeath to the corporation hereinafter directed to be formed, all the excess and residue of my estate over the sum of five hundred thousand dollars specified in the third paragraph hereof.

"*Fifth.* I direct my executor and executrix as soon as practicable after my decease and during the lives of my said wife and her said brother or the life of the longest liver of them, to procure under the laws of the State of Ohio, an incorporation to be formed with proper powers for the purpose of establishing an institution on the farm known as the Williams Farm, formerly owned by me and now owned by my wife, fronting on Erie street in the town of Willoughby, Lake county, Ohio, or if said farm be for any cause not available, then on other suitable premises in the said town of Willoughby, for the free education of girls and for their support in proper cases during education with a special view toward rendering them self-supporting.

"Said institution shall contain, among others, a Sewing Department, Cooking Department, Designing Department and Departments of Phonography and Typewriting and other useful work that would afford the pupils employment in life, including such new discoveries and inventions as may be made from time to time tending to enlarge the opportunities for useful and honorable employment for women and such as will aid them in obtaining honorable and independent positions in life. Such school to be open only to girls between the ages of ten and sixteen, both inclusive.

"Not exceeding one-tenth of the sum devoted to the said institution by the fourth paragraph hereof may be used for the erection of suitable buildings therefor on the said farm or in the contingency above specified for the purpose of suitable premises in said town and the erection of such buildings thereon and the income of the remaining nine-tenths shall be devoted to the support and maintenance of said institution.

"If, when the said sum shall be received by the said corporation the one-tenth shall not, in the judgment of the directors, be sufficient for such erection or such purchase and erection as the case may be, the whole sum may, in their discretion, be allowed to accumulate until the one-tenth thereof with its accumulation shall be so sufficient when such one-tenth may be used therefor, while the income of the remaining nine-tenths of said sum and accumulation shall be devoted to the support and maintenance of said institution.

"The charter of the said corporation shall also provide if and so far as may be consistent with law and practicable for the management of the said corporation by a board of five directors, to consist of the Governor for the time being of the State of Ohio, the Member of Congress for the time being for the Congressional district embracing the said Town of Willoughby, the Treasurer for the time being of said county of Lake, the Mayor for the time being of Willoughby and the said Gamaliel C. St. John and for the choice of a resident of Willoughby by the said Governor as successor to the said St. John as often as the fifth place shall become or be vacant.

"*Sixth.* If my said wife shall die before me, then the dispositions

provided for in the third and fourth paragraphs hereof shall take effect upon my death.

"*Seventh.* I direct my said executor and executrix as soon as they may deem advisable, but within two years after my decease, to sell all my real estate and invest the proceeds in interest paying securities and as to all my estate I give them and my trustees power to invest and reinvest the same or any part thereof having regard both to income and safety.

"*Eighth.* In case my intention with respect to the said institution for girls shall because of illegality fail, or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution at Washington, District of Columbia, to be devoted to the purpose for which it was established."

He appointed his wife executrix and the plaintiff, his brother in-law, executor of his will.

At the time of making said will the testator had a wife, but did not have a child or parent living. The testator and Mrs. Andrews perished in a fire which destroyed their home in the city of New York in the early morning of April 7th, 1899, and it is found as a fact that as between the said Wallace C. Andrews and his wife, Margaret M. St. John Andrews, survivorship is unascertainable. It is also found that the said Wallace C. Andrews at the time of his death did not have a wife, child or parent.

On or about the 13th day of May, 1902, the plaintiff, as the surviving executor named in the will of the testator, procured an incorporation to the formed under the laws of the state of Ohio entitled "The Andrews Institute for Girls," which corporation it is found has capacity under the laws of the state of Ohio to take the gift under the fourth, fifth and sixth clauses of said will; and it is also found that said clauses of said will were at the time of testator's death valid under the laws of the state of Ohio.

The Smithsonian Institution was established in the District of Columbia by act of Congress and by such act it was given power to receive money or other property by gift, bequest or devise.

The Special Term held that the Andrews Institute for Girls took under the will the entire rest and residue of the testator's estate over and above said five hundred thousand dollars, together with the income which accrued and accumulated thereon between the testator's death and the date of the incorporation of said institute. The Smithsonian Institute contends: (1) That as Mrs. Andrews did not survive her husband and the proposed Ohio corporation was not in existence at the time of the death of Mr. Andrews, the gift to the proposed corporation failed. (2) That the so-called Andrews Institute for Girls has no legal existence. (3) That the so-called Andrews Institute for Girls is not the corporation that the testator directed his executors to procure to be formed and that it is, therefore, incapable of taking the bequest. The Smithsonian Institution and the next of kin of the testator severally contend that the attempted bequest to the Ohio corporation violates the provisions of chapter 360 of the Laws of 1860.

Although the appellants unite in such contention they do not

agree as to the effect of sustaining their contention. The Smithsonian Institution contends that the gift to the Ohio corporation is an entirety, and that as it violates the provisions of chapter 360 of the Laws of 1860, it wholly fails for illegality and that the gift passes under the will to it.

The next of kin contend that the gift to the extent of one-half of the testator's estate is valid but that the testator did not have testamentary capacity to give more than one-half of his estate to the proposed Ohio corporation and that the excess is undisposed of by the will and passes to them under the statutes of this state.

The next of kin contend that the income on the rest and residue of the estate accruing between the death of the testator and the incorporation of the Andrews Institute for Girls could not be accumulated for a corporation not in existence and that as such income is not bequeathed by the testator's will it passes to them under the Statute of Distributions.

At the time the testator made his will, his wife made her will by which she gave to him the real property referred to in his will as the Williams farm in the state of Ohio, and also other valuable real property in the city of New York, and she by her will further provided that if her husband should die before her that said real property should "Go to and form a part of his residuary estate and be disposed of according to the provisions of his will bearing even date herewith (therewith)," and she in her will formally adopted and approved his will and copied the same into and made it a part of her will.

Mr. and Mrs. Andrews were possessed of ample fortune. They had no descendants. They had a well-defined scheme for founding a commendable charity. In that scheme they were in full accord and the will now before us is one of the steps taken to carry out such scheme and purpose. Charitable bequests by persons thus circumstanced have always been favored in this state and there is every reason now why the courts should so far as consistent with the rules of law aid in carrying out the laudable charity intended.

A competent testator may devise his property as to him seems best, providing always that in doing so he does not violate a statute or rule of law.

The validity of the provisions of a will relating to a corporation devisee holding, investing, accumulating and applying the property devised is for the courts of the domicile of the corporation to determine. (*Hope v. Brewer*, 136 N. Y. 126; *Robb v. Washington & Jefferson College*, 185 N. Y. 485.)

Although it has been found as a fact in this case that the fourth, fifth and sixth clauses of the will of the testator are valid under the laws of the state of Ohio and that the corporation as formed in that state has capacity to take the gift under said clauses of the will, we will briefly refer to the law of this state which in our judgment sustains such gift.

It has long been settled in this state that a person may by will devise and bequeath property to a corporation to be formed after his death if it is therein provided that such corporation shall be so

formed and the property vest in it within a period not longer than the lives of two persons in being at the time of the execution of the instrument. (*Burrill v. Boardman*, 43 N. Y. 254; *Tilden v. Green*, 130 N. Y. 29; *Inglis v. Trustees Sailors' Snug Harbor*, 3 Peters, 99.)

A gift to a corporation to be so formed is valid in Ohio. (*Trustees of McIntyre Poor School v. Zanesville Canal & Manufacturing Co.*, 9 Ohio, 203.)

There is no reason why property cannot be given to a corporation to be formed after the death of the testator and within the restricted period any more than there is why property should not be given to descendants or other persons thereafter to be born. In determining the legality of the gift there is no distinction between a natural person thereafter to be born and an artificial person thereafter to be organized.

There is nothing in the will under consideration which shows that the testator necessarily expected that the proposed corporation would be formed during the lifetime of his wife. Every statement in the will shows that he contemplated that the corporation be formed "*as soon as practicable after my* (*his*) *decease.*"

The gift in the language of the will is "To the corporation hereinafter directed to be formed." The corporation could have been formed in Mrs. Andrews' lifetime if she had survived the testator. In case she had died at some period of time before the testator, or in case she had survived the testator and the corporation had not been formed in her lifetime, it could have been formed thereafter at least within the life of her brother, the executor. The language of the fifth paragraph of the will so states in clear terms, and there is no reason for assuming that it should not be given its clear and ordinary meaning, whether it is considered in determining the time when the gift shall take effect or as a limitation on the period of restraint to the power of alienation. The intention of the testator is further shown by the sixth paragraph of the will, which expressly provides that in case his wife should die before his death, the disposition provided in the third and fourth paragraphs of the will should take effect upon his death. The directions for the formation of the corporation are contained in the will itself, and its formation, therefore, necessarily required that some period of time should elapse after his death in which the corporation could be formed.

In the discussion by the appellants they have not disputed that the gift could have taken effect *in futuro* if Mrs. Andrews had died before the testator's death; neither have they disputed that a corporation might be formed after the death of Mrs. Andrews if she had survived the testator.

We do not appreciate the force of the appellants' contention that notwithstanding a corporation could have been organized to take the gift *in futuro* if Mrs. Andrews had died before the death of the testator, or if she had died subsequent to the testator and during the lifetime of her brother as she died simultaneously with the testator, the gift to the corporation to be formed has failed. We are of the opinion that if Mrs. Andrews had survived her husband and the corporation had been formed in her lifetime, the gift would have been one *in præsenti*, taking effect upon the death of Mrs. Andrews, but as

Mrs. Andrews did not survive her husband and the corporation could not be formed except under the directions contained in the testator's will, it is necessarily a gift *in futuro* to take effect upon the organization of such corporation.

The testator's direction to the executor and executrix and the survivor of them, was to procure an incorporation to be formed under the laws of the state of Ohio, without specifying any particular method of procuring such incorporation. He did not direct that it should be chartered by an act of the general assembly of the state of Ohio. Indeed, if he gave the matter any special consideration he must have known that the constitution of the state of Ohio prohibits the passage of special acts conferring corporate powers. (Constitution of Ohio, art. 13, sec. 1.)

At the death of the testator the general statutes of Ohio provided that corporations might be formed for any purpose for which individuals might lawfully associate themselves, except for carrying on professional business. (Bates Ann. Ohio Statutes [6th ed.], vol. 2, p. 1836.)

Subsequent to the death of the testator and in March, 1902, an act was passed by the general assembly of the state of Ohio entitled "An act to provide for the administration of charitable trusts in certain cases." If we assume that such act was passed to aid in the incorporation of the Andrews Institute for Girls, it is not necessarily unconstitutional for that reason. It is not an uncommon thing in any state for questions to arise making it desirable or perhaps necessary for further general legislation to enable persons interested to carry out desired and desirable measures. The fact that such further general statute is passed to aid a particular person for the time being does not make the act a special, as distinguished from a general one. Whether an act, general in form, is a mere device to evade a wholesome constitutional provision is largely dependent upon the special circumstances of each case. If the act relates to persons, places and things as a class and is neither local nor temporary the mere fact that its practical effect is special and private does not necessarily prove that it violates constitutional provisions against special legislation. (*Matter of N. Y. El. R. R. Co.*, 70 N. Y. 327-344; *In the Matter of Church*, 92 N. Y 1; *Matter of Henneberger*, 155 N. Y. 420, 426; *People v. Dunn*, 157 N. Y. 528; *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377; *People ex rel. Clauson v. Newburgh & S. Plank Road Co.*, 86 N. Y. 1; *Matter of N. Y. & L. I. Bridge Co.*, 148 N. Y. 540; *Waterloo W. M. Co. v. Shanahan*, 128 N. Y. 345; *Ferguson v. Ross*, 126 N. Y. 459; *Sun P. & Pub. Association v. Mayor etc., of N. Y.*, 152 N. Y. 257.)

The act so passed by the general assembly of the state of Ohio in 1902 would not seem to be a violation of the Constitution of that state. (*Platt v. Craig*, 66 Ohio St. 75; *State ex rel. v. Spellmire*, 67 Ohio St. 77; *Gentreh v. State of Ohio*, 71 Ohio St. 151; *Cinn. Street R. R. Co. v. Horstman*, 72 Ohio St. 93; *State of Ohio v. Sherman*, 22 Ohio St. 411.)

Subsequent to the death of the testator, and on the 8th day of May, 1902, "The Andrews Institute for Girls" was incorporated pursuant to the laws of the state of Ohio "for the purpose of receiving the

property devised and bequeathed in and by the wills of Wallace C. Andrews and Margaret M. St. John Andrews, late of the city and state of New York, to the corporation therein directed to be formed and for the purpose of carrying out the charitable purposes in such wills expressed, and of establishing and maintaining the institution therein provided for."

The articles of incorporation include a complete copy of the will of the testator and also of the will and codicil of Margaret M. St. John Andrews. They also provide that the corporation shall be located in the town of Willoughby, Ohio, and name as members of the corporation the persons proposed in the will of said testator, together with two other persons in the state of Ohio, which persons so named constitute the board of directors for the administration and management of the property and trust or other funds of the corporation, and for the control and management of said institution. Said act of the general assembly of the state of Ohio among other things provides: "The attorney-general of the state of Ohio shall in his official capacity have power to bring proceedings in any court of record and enforce any such devise or bequest whenever he deems such action necessary for the protection and carrying out of the purposes named in said last will and testament without waiting for the organization of such corporation."

Many objections are urged to the Andrews Institute for Girls taking the gift because it is claimed that it is not the corporation that the testator directed his executor to procure to be formed. It does not seem necessary to consider these objections at length in view of the fact that the articles of incorporation do not violate any of the provisions of the will of the testator and of the further fact that the will is made a part of the articles of incorporation. The attorney-general of the state of Ohio has authority by the general statutes of that state to cause proper suits to be instituted to enforce the performance of trusts for charitable and educational purposes and to restrain the abuse thereof, whenever upon the complaint of others or from his own knowledge he deems such suit to be advisable or whenever by the governor, the Supreme Court or the general assembly or either branch thereof he is directed so to do and such suits may be brought in his own name on behalf of the state or of the beneficiary of the trust. The statute of 1902 as we have seen also provides that the attorney-general shall have power to bring proceedings to enforce such devise or bequest whenever he deems such action necessary for the protection and carrying out of the purposes named in such will. We are of the opinion that the plaintiff as the surviving executor of the last will and testament of the testator has procured to be formed an incorporation under the laws of the state of Ohio as directed by said will and that such corporation has power to take the gift and hold the same for the purposes of its incorporation.

It is conceded that the testator left more than one-half of his estate after the payment of his debts to the corporation to be formed as stated in his will.

Chapter 360 of the Laws of 1860 provides as follows: "No person having a husband, wife, child or parent, shall, by his or her last

will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, (and such devise or bequest shall be valid to the extent of one-half, and no more)."

When the testator made his will his wife was living, but the Special Term was unable to determine which, if either, survived the other. The rule is that there is no presumption of survivorship in the case of persons who perish by a common disaster, in the absence of proof tending to show the order of dissolution. In such case the question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous. (*Young Women's Christian Home v. French*, 187 U. S. 401; *Newell v. Nichols*, 75 N. Y. 78.)

Does the act of 1860 speak as of the time when a person executes a will, or of the time when by the death of the testator the will becomes operative and effective? If the act speaks as of the death of the person making the will, did the testator in this case die "having a wife"?

The purpose of the act is important, and this court in *Hollis v. Drew Theological Seminary* (95 N. Y. 166, 175), referring to a will made within two months before the testator's death (see Laws of 1848, chapter 319, section 6), say: "Such wills become evil only like all wills when they fail to deal fairly and justly by those persons who have claims upon the testator's care and bounty, and the policy of the statute is to protect such persons, and this it does by a general rule. There is no policy outside of the statute which condemns such wills. The policy is found only in the statute and reaches no further than the statute."

Again in the same case the court say: "It is not against public policy to allow gifts to charitable, benevolent, scientific, or educational institutions; the law allows and encourages such gifts and those who make them are commended as the benefactors of their race." In that case the court also say that it is as praiseworthy to give to those institutions by will within two months before a testator's death as at an earlier date.

So it is as praise worthy in this case to give an amount in excess of one-half of the estate of the testator after the payment of debts as to give one-half thereof except so far as the giving an amount in excess of one-half affects the rights and personal interests of those dependent upon the testator for their care and support.

The statute in question is not a mortmain act. (*Amherst College v. Ritch*, 151 N. Y. 282, 333.) Quoting from the case last mentioned the court further say: "It is aimed simply at the giving of an undue proportion to charity by will when certain near relatives have in the opinion of the legislature a better claim. * * * Its theory is not to keep property away from charitable corporations but to prevent a testator from giving them more than one-half of his net estate at the expense of his wife, child or parent. Its sole purpose is to protect those natural objects of his bounty from improvident gifts to their neglect. * * * It points toward no public interest

but toward the prevention of what the legislature regarded as a private wrong. It was passed for the benefit of the persons named in it not for the benefit of the people at large as a measure of state polity. Indeed the state has no policy against institutions of charity or learning."

This court in *Chamberlain v. Chamberlain* (43 N. Y. 424, 440), in referring to this act, say: "The object of which was to prevent a person upon whom others standing in near relation had claims from disappointing their just expectations and disinheriting them from pious or philanthropic motives."

The statute does not in terms say that a person having a husband, wife, child or parent shall not *make his or her last will and testament* and devise or bequeath to a charitable or other association more than one-half of his or her estate. If the legislature so intended it would have been a very simple matter for it to have used language to prevent the making of a will devising or bequeathing to charitable or other associations more than one-half of the property owned by the person at the date of the will or that might be thereafter acquired by such person. The language of the statute should be construed as commonly understood, and the words "devise or bequeath" have been generally treated and understood as referring to the time when the will takes effect.

A will takes effect not at the time of its execution but on the death of the testator. In *Moultrie v. Hunt* (23 N. Y. 394) this court, referring to a will, say: "It is of the essence of a will that until the testator's death it is ambulatory and revocable. No rights of property or powers over property were conferred upon any one by the execution of this instrument, nor were the estate, interest or rights of the testator in his property in any way abridged or qualified by that act. The transaction was in its nature inchoate and provisional; it prescribed the rules by which his succession should be governed, provided he did not change his determination in his lifetime."

It is not contended but that the statute in referring to the part or portion of the estate that a person can give to a charitable or other association refers to the time of the death of the person making the gift. If this were not so it would be necessary in every instance to proceed as of the date of the will to an accounting to ascertain the extent of the assets and liabilities of every testator making gifts to such associations.

The act should be considered from a practical and reasonable standpoint. The appellants' contention would require us to construe the statute as speaking of one time for one purpose and of a different time for another purpose. If we construe the statute as in all things referring to the time when the will is made a person might make a will which would not then violate the statute and by acquiring more property he might leave at his death far more than one-half of his estate to charitable or other associations contrary to the spirit of the act without violating its terms. Numerous illustrations could be suggested of the result of accepting the appellants' contention such as a will made at a time when a person had one or more of the named relatives living, all of whom should predecease him, or a will made

by a person when he did not have one or more of the named relatives living and subsequently by marriage and the birth of children such person should die leaving one or more such relatives.

The statute does not require or reasonably admit of the appellants' contention. With the exception of the query in *Matter of Dowt* (58 How. 107; *S. C.*, 8 Abb. N. C. 118) and what was said in *McKeown v. Officer* (25 State Rep. 319), the courts have quite uniformly referred to the act of 1860 as one intended to prevent a person *who leaves him surviving* a husband, wife, child, or parent from giving in trust or otherwise to charity more than one-half of his estate. (*Amherst College v. Ritch*, 151 N. Y. 282, 332, 340; *Lefevre v. Lefevre*, 59 N. Y. 434; *Matter of Will of Walker*, 136 N. Y. 20, 26; *Henriques v. Sterling*, 26 App. Div. 30, 34; *Chamberlain v. Chamberlain*, 3 Lansing, 348, 386; *S. C.*, 43 N. Y. 424; *Robb v. Wash. & Jeff. College*, 103 App. Div. 327; *Matter of Stilson*, 85 App. Div. 132.) In these and many other cases in construing said act the words "having" and "leaving" have been used interchangeably.

It has frequently been held in contracts relating to insurance and other matters where a certain result is to follow in case of one beneficiary dying before the insured or promisor, that in case of a death of the insured or promisor and the beneficiary at the same time that the result will follow and that dying at the same time is equivalent to dying before. (*Young Women's Christian Home v. French*, 187 U. S. 401; *Paden v. Briscoe*, 81 Texas, 563; *Fuller v. Linzee*, 135 Mass. 468; *Balder v. Middeke*, 92 Ill. App. 227; *Southwell v. Gray*, 35 Mo. 740; *Middeke v. Balder*, 198 Ill. 590; *Males v. Sovereign Camp*, 30 Texas Civ. App. 184; *Supreme Council v. Kacer*, 96 Mo. App. 93.)

It is interesting to note that in this case if we assume that the statute speaks as of the date of the will, except that the estate is treated as of the net amount left by the testator at his death, nevertheless the will does not devise or bequeath more thon one-half of the net estate to the Andrews Institute for Girls if Mrs. Andrews' life estate is computed in the usual way of computing the value of a living life estate owner.

We think that in view of the purpose for which the act was passed and has been continued in force, and in view of the universality of the rule that a will speaks from the death of the testator, that the statute should be construed to mean the same as if the words "him or her surviving" were therein appropriately used to indicate the time at which the statute intends to speak.

Mr. and Mrs. Andrews perished together. There was no point of time when the title of Mr. Andrews was divested at which Mrs. Andrews could have taken it, and in construing such statute her simultaneous death is in effect the same as a death before his death. (*Young Women's Christian Home v. French, supra.*)

The Andrews Institute for Girls was not organized until the 8th day of May, 1902. It was more than three years from the date of the death of the testator before such corporation came into being. During that time income accrued upon the residuary fund so given to said corporation to be formed. The question as to who is entitled

to such income has been discussed at great length in this court, but a clear statement of a few simple and uncontroverted propositions makes its determination comparatively plain and easy.

If the corporation had existed prior to the death of the testator so that the gift to it could have taken effect upon such death no question would have arisen but that such corporation would have been entitled to the income upon the fund even before it had actual possession thereof. The gift of the rest and residue of the testator's property was a gift of an expectant estate to take effect upon the formation of the corporation. Some income necessarily accrued thereon at a time before such corporation was capable of receiving the same. Such income was either payable as it accrued to some person or persons entitled to receive it, or it was the duty of the executor to accumulate the same for the benefit of the corporation when formed.

It is provided by the Real Property Law (Laws of 1896, chapter 547, section 51) that "All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void." The only directions for the accumulation of rents and profits of real property that are allowed by statute are those for the benefit of infants in being at the creation of the estate out of which the rents and profits are to arise.

It is also provided by the Real Property Law (Section 53) that "When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate."

It is provided by the Personal Property Law (Laws of 1897, chapter 417) that an accumulation of the income of personal property directed by any instrument for the benefit of minors in being at the date of the instrument or the death of the person executing the same is valid, and it is further therein provided that "All other directions for the accumulation of the income of personal property, not authorized by statute, are void." (Section 4.)

By section 2 of said Personal Property Law provision is made for the suspension of the absolute ownership of personal property during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or conditions or if such instrument be a will for not more than two lives in being at the death of the testator. And it is therein further provided that "In other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property." The accumulation of income for any period of time except for the benefit of a minor as stated, is prohibited by statute. (*Cochrane v. Schell*, 140 N. Y. 516; *Manice v. Manice*, 43 N. Y. 376; *Pray v. Hegeman*, 92 N. Y. 508; *Thorn v. De Breteuil*, 179 N. Y. 64; *Hascall v. King*, 162 N. Y. 134.) Obviously, implied accumulations are as much forbidden as express ones. (*Vail v. Vail*, 4 Paige, 317.)

It is urged that chapter 701 of the Laws of 1893 has removed gifts, grants, bequests or devises to religious, educational, charitable or benevolent uses from the statutory prohibition against accumulations. A rule of law established by judicial decisions and by statute and so rigidly adhered to for many years should not be held to have been abrogated by a subsequent statute unless the intention of the legislature so to abrogate the same is expressed in clear terms or by necessary implication. Both the said Real Property Law and the said Personal Property Law from which we have quoted were enacted subsequent to said act of 1893 without making any exceptions to the general prohibition against accumulations contained therein other than as stated by us.

Said chapter 701 of the Laws of 1893 as originally enacted and as amended by chapter 291 of the Laws of 1901 does not in clear terms remove the prohibition against accumulations in favor of gifts therein named to charitable and other uses. It provides that gifts, "in other respects," "valid under the laws of this state" shall not be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries and gives to the Supreme Court control over such gifts. If it is held that the prohibition against accumulations as to such gifts has been abrogated it would enable an accumulation for any term of years providing the future estate however remote is given in trust for charity. We are not willing to hold that such gifts are exempt from the prohibition against accumulations. (*Smith v. Chesebrough*, 176 N. Y. 317; *Robb v. Wash. & Jeff. College, supra.*)

The income on the residuary fund left by the testator could not be accumulated during the period between his death and the formation of such corporation. The income of the said residuary fund belonged as it accrued to some person or corporation who could spend it at will. There is no provision of the will expressly giving and bequeathing it. We must, therefore, turn to the statute to ascertain to whom it should be paid.

It is provided by statute that it belongs "To the persons presumptively entitled to the next eventual estate." The persons entitled to the next eventual estate are the persons entitled to the estate at the end of the period of accumulation. This court in *Manice v. Manice* (*supra*) say: "The statute does not say the ultimate, but the next eventual estate. That is, the estate which is to take effect upon the happening of the event which terminates the accumulation. Those who presumptively will be entitled to receive the rents and profits, when the period of accumulation ends, are entitled to anticipate the event which is to terminate the accumulation and to take at once, the rents and profits which are undisposed of or unlawfully directed to be accumulated."

The event was the formation of the Andrews Institute for Girls, and the person entitled to the estate on the happening of the event is said Andrews Institute for Girls, but said institute could not anticipate the event which was to terminate the accumulation, because it was not in existence, and it was not capable of receiving such income.

The Smithsonian Institution is not a residuary legatee. The gift to it is an alternative gift dependent upon the gift to the Andrews Institute for Girls failing because of illegality or because the intention of the testator with respect to said institution became impossible for realization. The proposed incorporation is not and never was illegal. It could not, therefore, fail for illegality. Neither was it ever *impossible* of realization. The Smithsonian Institution, therefore, is not and never was presumptively entitled to the next eventual estate.

The delay in the incorporation of the Andrews Institute for Girls was not merely incidental and fortuitous as where a fund is vested in a corporation and only the possession is temporarily and incidentally withheld. The corporation in this case was to be formed "As soon as practicable" and "During the lives of my (testator's) said wife or her said brother or the life of the longest liver of them." A delay under such directions, whether for a longer or shorter period of time, is not merely incidental, but a delay by which the gift becomes a future estate. It is a matter of little consequence whether the income arising before the vesting of the future estate is called an increment, accretion or acceleration of the principal or an accumulation. It cannot under either name be paid to the Andrews Institute for Girls except as an accumulation of income arising from the fund at a time not only before the vesting of the future estate but at a time when the corporation had not yet come into being.

The testator having failed to give and bequeath such income to a person or persons capable of receiving it, such income passes to the next of kin under the Statute of Distributions. (*Cochrane v. Schell*, 140 N. Y. 516; *U. S. Trust Co. v. Soher*, 178 N. Y. 448.)

It is unnecessary to discuss the many other questions presented upon this appeal.

The judgment appealed from should be modified so as to give to the next of kin of the testator the income on the rest and residue of the estate from the date of the death of the testator to the formation of such corporation, and as so modified the judgment should be affirmed, with costs to each of the attorneys appearing and filing briefs in this court payable out of the principal fund.

CULLEN, *Ch. J.*, GRAY, HAIGHT, WERNER, WILLARD, BARTLETT and HISCOCK, *JJ.*, concur.

Judgment accordingly.

Notice of Motion for Reargument.

Court of Appeals of the State of New York.

GAMALIEL C. ST. JOHN, as Executor of and Trustee Under the Last Will and Testament of Wallace C. Andrews, Deceased, Plaintiff-Respondent,

against

THE ANDREWS INSTITUTE FOR GIRLS and Others, Defendants-Respondents; SMITHSONIAN INSTITUTION ET AL., Defendants-Appellants.

SIRS: Please take notice that on the case on appeal herein, the opinion of Hon. Emory A. Chase herein, the remittitur herein, and the affidavit of Frank W. Hackett, Esq., verified the 20th day of March, 1908, the undersigned will move this Court, at the City of Albany, New York, on the 30th day of March, 1908, at the opening of Court, and will submit briefs for an order recalling the said remittitur and permitting and directing a re-argument of this cause upon the grounds stated in the annexed affidavits, and for such other and further order and relief as to the Court may seem just in the premises.

Dated, New York, March 20th, 1908.

Yours, etc., WETMORE & JENNER,
Attorneys for Defendant-Appellants Smithsonian Institution and Ano.

Office & Post Office Address, 34 Pine Street, Borough of Manhattan, New York City.

[Addressed to the attorneys of the various parties.]

Affidavit Served with Notice of Motion.

Court of Appeals of the State of New York.

GAMALIEL C. ST. JOHN, as Executor of and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, Plaintiff-Respondent,

against

THE ANDREWS INSTITUTE FOR GIRLS and Others, Defendants-Respondents; SMITHSONIAN INSTITUTION ET AL., Defendants-Appellants.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Frank W. Hackett, being duly sworn, deposes and says: that he is one of the attorneys for the Smithsonian Institution and Melville W. Fuller, as Chancellor of the Smithsonian Institution, two of the defendants-appellants herein; that the appeal herein was argued in

this Court on January 16th, 1908; that in the brief, as well as upon the oral argument submitted on behalf of the said defendants-appellants, it was contended that the Andrews Institute as incorporated is not the corporation which the testator directed should be procured under the laws of Ohio, and that Mr. Andrews meant that the corporation should contain in its charter certain limitations and restrictions specified in the Will; that the corporation as formed had general powers and was not thus restricted and that if it should be contended that a copy of the Will by direction of the statute was to be contained in the articles of incorporation, it would still remain that the statute did not make the limitations and restrictions of the Will effective, and it was further contended that if it was held by the Court that such limitations and restrictions were effective, then the incorporation was illegal and void because of the constitutional inhibition upon the legislative against assembly conferring corporate powers by special act, and although it was contended in said brief and on said argument, on behalf of said defendants-appellants, that under Article 4, section 1, of the Constitution of the United States the said defendants-appellants had the right to have this constitutional inhibition applied to the charter of the corporation, it is believed and supposed by the attorneys for the said defendants-appellants that these contentions and points submitted on their behalf have been overlooked or misapprehended by the Court of Appeals, and deponents asks that it be permitted to re-argue these points before the Court, or that if the prayer for re-argument be not allowed, such modification be made in the language of the opinion of the Court of Appeals as to bring forward substantially the fact that the above mentioned points were submitted and argued on behalf of the said defendants-appellants, so that it may clearly appear in said opinion that the federal question hereinbefore set forth was raised upon the record; that the points supposed to have been overlooked or misapprehended by the Court are contained in the following pages of the case: pp. 18 to 22 inclusive, 44 to 53 inclusive and 507, and the authorities relied upon by the defendants-appellants in support of the argument submitted by them as aforesaid are the following: Article 4, Section 1 of the Constitution of the United States; Articles II and XIII of the Constitution of the State of Ohio.

Gentch *v.* State, 71 Ohio St., 165.
Platt *v.* Craig, 66 Ohio St., 75.
Atlantic Monthly, January, 1906, p. 71.

FRANK W. HACKETT.

DISTRICT OF COLUMBIA, *ss:*

Sworn to before me this 20th day of March, 1908.

MINNIE LESTER,
Notary Public.

Notary's seal and certificate.

STATE OF NEW YORK:

In Court of Appeals.

At a Court of Appeals for the State of New York, held at the Capitol, in the City of Albany, on the 12th day of June, A. D. 1908.

Present: Hon. Edgar M. Cullen, chief judge, presiding.

GAMALIEL C. ST. JOHN, as Executor, &c., Respondent,
against
THE ANDREWS INSTITUTE FOR GIRLS and Others, Respondents, and SMITHSONIAN INSTITUTION and Others, Appellants.

A motion for a re-argument of the above cause having been heretofore made upon the part of the appellants, Smithsonian Institution and another, and papers having been duly submitted thereon and due deliberation thereupon had;

Ordered, that the said motion be and the same hereby is denied, with ten dollars costs, no Federal question having been raised in this court.

Supreme Court of the United States.

SMITHSONIAN INSTITUTION and MELVILLE W. FULLER, as Chancellor of the Smithsonian Institution, Plaintiffs-in-Error,
vs.
GAMALIEL C. ST. JOHN, as Executor of and Trustee under the Last Will and Testament of Wallace C. Andrews, Deceased; THE ANDREWS INSTITUTE FOR GIRLS, JOHN CUNNEEN, as Attorney General of the State of New York; LURY ANN MOORE, PHEBE R. MOORE, GAMALIEL C. ST. JOHN, GAMALIEL C. ST. JOHN, as Executor of the Last Will and Testament of Margaret M. St. John Andrews, Deceased, and GAMALIEL C. ST. JOHN, as Administrator, with the Will Annexed, of Georgie Boyden St. John, Deceased; VOLNEY ROGERS, as Ancillary Administrator of the Goods, Chattels, and Credits of Lawrence G. Andrews, Deceased; EMMA H. ANDREWS, NORMAN C. ANDREWS, EDITH A. LOGAN, and JULIA A. BRUCE, Defendants-in-Error.

Petition.

Now come the Smithsonian Institution and Melville W. Fuller, as Chancellor of said Smithsonian Institution, the above named plaintiffs-in-error, by Frank W. Hackett, their attorney, and say, that on or about the 20th day of February, A. D. 1908, the Court of Appeals of the State of New York made and entered a final order and judgment herein in favor of Gamaliel C. St. John, as Executor of and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased; The Andrews Institute for Girls; John Cunneen, as Attorney General of the State of New York; Lury Ann Moore; Phebe R. Moore; Gamaliel C. St. John; Gamaliel C. St. John as Executor

of the Last Will and Testament of Margaret M. St. John Andrews, deceased, and Gamaliel C. St. John, as Administrator with the Will annexed of Georgie Boyden St. John, deceased; Volney Rogers, as Ancillary Administrator of the Goods, Chattels and Credits of Lawrence G. Andrews, deceased; Emma H. Andrews; Norman C. Andrews; Edith A. Legan and Julia A. Bruce, defendants-in-error above named, and against the Smithsonian Institution and Melville W. Fuller, plaintiffs-in-error above named; and thereafter, on or about June 16th, by order made and entered on that day modified and amended said judgment, and afterwards the records and proceedings in said cause having been finally remitted to the Supreme Court of the State of New York in and for New York County, said final order and judgment of the Court of Appeals as so modified and amended was made and entered as the final order and judgment of said Supreme Court on the 26th day of June, 1908, in which final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of said plaintiffs-in-error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

The said Court of Appeals of the State of New York is the highest Court of said State of New York in which a decision in this cause could be had.

Wherefore, your petitioners pray that a writ of error may issue in this behalf from the Supreme Court of the United States to the Supreme Court of the State of New York for the correction of the errors and reversal of the judgment so complained of; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States; that said writ of error operate as a supersedeas; that the amount of security which the petitioner shall give and furnish on said writ of error may be fixed, and that upon the giving of such security all further proceedings in said court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated this 29 day of October, 1908.

FRANK W. HACKETT,
Attorney for Petitioners.

The writ of error as prayed for in the aforesaid petition is hereby granted, and the bond fixed at the sum of five hundred Dollars.

Dated the 29 day of October, A. D. 1908.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Title.]

Assignment of Errors.

Now come the Smithsonian Institution, and Melville W. Fuller, as Chancellor of the Smithsonian Institution, by Frank W. Hackett, their counsel, and, in connection with the petition for the writ of

error filed herewith, say that in the record and proceedings in this cause and in the final order and judgment made and entered herein on the 26th day of June, A. D. 1908, by the Supreme Court of the State of New York on a remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to wit:

I.

Error in that, after holding that by virtue of the Act of the General Assembly of Ohio, of March, 1902, the will of Mr Andrews had been constituted a part of the articles of incorporation of The Andrews Institute, incorporated under that Act, so as to make the limitations and restrictions of said will effective as charter provisions, the Court did not apply to the said Act of 1902 the inhibition of section one, article thirteen of the Constitution of Ohio, forbidding the General Assembly to pass any special act conferring corporate powers.

II.

Error in that the Court, in contravention of Section 1 of Article IV of the Constitution of the United States, failed to give full faith and credit to section one, article thirteen of the Constitution of Ohio, forbidding the General Assembly to pass any special act conferring corporate powers, though asked so to do in the event it should hold that the limitations and restrictions of Mr. Andrews' will became effective by being made a part of the articles of incorporation, which holding it did make.

Endorsed on cover: File No. 21,409. Supreme Court of the United States, October term, 1908. Term No. 613. Smithsonian Institution *et al.*, pl'ffs in error, *vs.* Gamaliel C. St. John, as executor, &c., *et al.* Agreed record. Filed November 25th, 1908. (21,409.)

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Supreme Court of the United States.

October Term, 1908.

No. 613.

SMITHSONIAN INSTITUTION, ETC.,
Plaintiff in Error,
vs.
GAMALIEL C. ST. JOHN,
As Executor, Etc.

BRIEF FOR PLAINTIFFS IN ERROR.

FRANK W. HACKETT,
EDMUND WETMORE,
For the SMITHSONIAN INSTITUTION, and
MELVILLE W. FULLER, as Chancellor of said Institution,
Plaintiffs in Error.

Rongahed, Printer,
City of Washington.

Supreme Court of the United States.

OCTOBER TERM, 1908.

SMITHSONIAN INSTITUTION, ETC.,
Plaintiff in Error,
vs.
GAMALIEL C. ST. JOHN,
As Executor, Etc.
No. 613.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

Wallace C. Andrews and his wife perished April 7, 1899, in their dwelling house, in New York City, in a fire where ten other persons lost their lives. Whether husband or wife died first is not known. Mrs. Andrews was twelve years younger than her husband. They had no children.

Mr. Andrews executed his last will at New York City, November 12, 1891. For some time he had then been, and he continued up to the time of his death to be, a citizen of New York.

The will was admitted to probate May 22, 1899. It names Mrs. Andrews and her brother, Mr. St. John (the present defendant in error), executrix and executor. To them the testator devises substantially his entire estate in trust to collect and pay over the income to Mrs. Andrews for her life. (Rec., 6.)

Upon the death of his wife, the testator bequeaths $500,000 to certain relatives. The residue, amounting (as LAUGHLIN, J. of the Appellate Division, states in his opinion of April, 1907,) to about $1,300,000 (Rec., 37), he

gives, likewise *upon the death of his wife,* to a corporation which he says is further on in the will directed to be formed.

The will later directs the executrix and executor, "as soon as practicable after my decease, and during the lives of my said wife and her said brother, or the life of the longest liver of them, to procure under the laws of the State of Ohio, an incorporation to be formed *with proper powers,* for the purpose of establishing an institution" in Willoughby, Ohio, for the free education of girls, and for their support in proper cases during education.

The institution, the will says, shall contain certain departments; the school shall be open *only* to girls between the ages of ten and sixteen; not exceeding one-tenth of the sum bequeathed may be used for the erection of suitable buildings. The will provides what the directors shall do, if the one-tenth is not sufficient for that purpose. Further the will says (Rec., 7): "The charter of the said corporation shall *also* provide if * * * consistent with law * * * for the management of the said corporation by a board of five directors," four to be men holding certain specified public offices, including a member of Congress from the district in which Willoughby is situated.

The eighth clause (Rec., 7) reads:

"In case my intention in respect to the said institution for girls shall because of illegality fail, or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution at Washington, District of Columbia, to be devoted to the purposes for which it was established."

The executor, alleging that doubts had arisen as to the construction of the will, and the validity of certain provisions, filed a bill asking the Court to determine to whom he should pay the residue. (Rec., 2-5.)

The Judge at special term (DOWLING) decided that the gift was good to the Andrews Institute (Rec., 35); and his

decision was affirmed by the Appellate Division (Rec., 36). Upon appeal to the Court of Appeals, the judgment of the Appellate Division was affirmed, with a slight modification as to income, accruing before the incorporation of the Andrews Institute.

The Smithsonian Institution claimed the residue upon the ground that the testator's intention with respect to the institution for girls had failed. It alleged four reasons therefor. The fourth was that the Andrews Institute, as incorporated, is not the corporation that the testator directs shall be procured to be formed under the laws of the State of Ohio; and that the legality of the gift to the institution for girls had been tested and that the bequest had failed.

Counsel argued that the testator had prescribed certain limitations and restrictions that should be put into the charter of the proposed corporation; that these charter restrictions were absolutely necessary to the creation of this particular corporation; that the corporation now claiming this money under the name of the "Andrews Institute" does not answer the description of the corporation which the testator intended to have formed; that the Andrews Institute, defendant, possesses general powers unrestrained by any charter provisions; that the gift being absolute "to the corporation," if the finding be upheld that the residue goes to the Andrews Institute now before the Court, then that corporation would take the money and do with it as it pleases—no one of the restrictions named by the testator being legally enforcible, so as to ensure a compliance with the wishes and directions of Mr. Andrews.

The Smithsonion Institution further maintained that should the Court incline to consider that copying the will into the articles of incorporation (as provided for in the Ohio statute of 1902) was sufficient to create a corporation whose charter answered the requirements of the will, the Court would observe that the statute of 1902 does not make the limitations and restrictions of the will effective. And,

further, should the Court hold that such restrictions and limitations are to be treated as effective because the will has been copied into the articles of incorporation, the counsel for the Smithsonian Institution advised the Court that the incorporation would in that event be illegal and void, because such a construction would render the Andrews Institute a specially incorporated institution. The Court was cited to the inhibition of the Ohio Constitution against the general assembly conferring corporate powers by special act, being Article XIII, Section 1, of that instrument. (Rec., 26.)

The manner in which this point was raised and pressed upon the attention of the Court of Appeals is noted in our brief upon the motion to dismiss. The Court of Appeals have held that the Andrews Institute is the corporation that the testator directed his executor and executrix to procure to be formed under the laws of the State of Ohio; and for a reason for so deciding the Court point to the circumstance that the will of Mr. Andrews forms a part of the articles of incorporation. In other words, the Court of Appeals have decided that the charter restrictions prescribed by Mr. Andrews form an operative part of the articles of incorporation, and this notwithstanding the Constitution of Ohio forbids the general assembly from passing any special act conferring corporate powers.

POINTS OF LAW.

I.

This Court Has Jurisdiction.

The Federal question is: Did the New York Court of Appeals, in deciding that the Andrews Institute is the corporation that the testator intended should be procured to be formed under the laws of Ohio, give full faith and credit to the clause of the Ohio Constitution providing that the general assembly shall pass no special act conferring corporate powers. (Rec., 26.)

We deem it unnecessary to add to what has been argued on this head in our brief upon the motion to dismiss. We there pointed out how completely the Court of Appeals in reaching this conclusion have ignored the Constitution of the State of Ohio. It was their duty to apply its principles, as they were asked to do, when the point had been raised that if copying the will into the articles of incorporation should be held to have the effect of limiting the powers of the directors, it would necessarily follow that the Act of 1902 should be pronounced unconstitutional, as being a special act conferring corporate powers.

Our Position Before the Court of Appeals.

We think that we have sufficiently met the argument that the Court of Appeals were only announcing their construction of the Act of 1902; and that the case is governed by *Johnson* v. *Life Insurance Company*, 187 U. S., 491. We have pointed out that the Court of Appeals took no notice whatever of the Constitution of Ohio in connection with our objection that the Andrews Institute was not the corporation that the testator directed should be procured to be formed. The opinion in respect to this point does not mention the Ohio Constitution; whereas in the Johnson case the ground of the decision is that the law of New York "was fully considered" by the Iowa court.

Had the Court of Appeals "fully considered" the prohibition of the Ohio Constitution it will be apparent that they must have decided that it operated to deny efficiency to the limitations and restrictions of Mr. Andrews's will, and therefore that our point was well taken. It is not conceivable that the Court of Appeals could have done otherwise, so plain is it that a corporation thus limited in its charter cannot be established under the laws of Ohio.

The Smithsonian Institution maintained before the Court of Appeals that the gift to the so-called Andrews Institute had failed for illegality:

1. The gift is to take effect upon the death of the wife. The provision for forming a corporation during the lives of the wife and her brother, or the life of the longest liver of them, is designed only to guard against the statute of perpetuities. It does not extend the time for vesting.

2. The testator attempts to give more than one-half of his estate to a charitable institution, in violation of the New York statute of 1860. The Smithsonian Institution not being within the terms of the statute, takes as alternative legatee.

3. The Ohio statute of 1902, under which the so-called Andrews Institute has been incorporated, is unconstitutional, as to wills whose testators had died before the act went into effect, because it grants corporate rights upon conditions purely arbitrary.

4. The Andrews Institute is not the corporation which Mr. Andrews directed should be procured to be formed.

The first two objections were disposed of by the Court of Appeals adversely to us. They are not open for discussion before this Court.

As for the third point the learned Judge says:

"The act so passed by the General Assembly of the State of Ohio in 1902, would not seem to be a violation of the Constitution of that State." (Rec., 50.)

The opinion cites five cases from the Ohio State Reports, not a single one of which (and we say it with due respect) appears to be in point.

II.

The Corporation to which the Testator Devised the Residue of His Estate Is One Whose Charter Limits and Restricts the Powers of Its Directors.

We propose to show that the Andrews Institute is not the corporation that Mr. Andrews directed should be procured to be formed, and that it cannot take the bequest.

The Corporation to Be of a Particular Kind.

The testator's intention is plain. He meant, if he could do it legally, to bestow his bounty upon a particular kind of corporation. He declares exactly what features shall characterize this corporation. He had designed an institution where girls not younger than ten, or older than sixteen, could be educated, with a special view towards fitting them for earning their living. It was not to be a girls' school of the ordinary kind. The education should be practical, and the girls, while learning, would in proper cases be supported. He specifies in what species of work they shall be trained.

How far this project would be likely to prove practicable may be a subject of serious consideration; but there cannot be the slightest doubt of the character of the institution that the testator had determined to call into being.

The will denotes various departments of the institution. It lays emphasis upon the useful nature of the education to be imparted. The pupils are to be fitted for work of a kind suited to their station in life. They are to learn sewing or cooking, or the occupations of designing, of phonography, or of typewriting. It is not meant to fit them for a professional career in music, or the drama. The directors cannot drop one of these useful branches, in order to take up a course that may in their judgment fit this or that young woman for a higher sphere of usefulness. The language of the will is imperative that the institution *shall* contain the departments designated. The utilitarian views of Mr. Andrews, and not the ideas that from time to time may dominate a board of directors, are to govern the administration of this novel scheme of charity.

The direction is explicit that only one-tenth of the sum in the hands of the directors shall be used for the erection of suitable buildings, or for the purchase of land and the erection of buildings. The testator wisely requires that nine-tenths of the money shall be devoted to support and mainte-

nance. If one-tenth is not sufficient in the judgment of the directors for securing land and erecting buildings, then the whole sum may be allowed to accumulate until such time as the one-tenth shall prove to be sufficient for that purpose.

Entrusting, as he does, a large sum of money to the hands of others to carry out an experiment, the testator appears to have conceived the idea that for investment and expenditure he could put confidence in those who for the time being shall fill certain public offices. He constitutes these officials a majority of a board of directors. We have this significant language:

"The charter of the corporation shall also provide, if and so far as may be consistent with law and practicable, for the management of the said corporation by a board of five directors."

Then he names the Governor, the Member of Congress from the district embracing the town of Willoughby, the County Treasurer, together with the Mayor of Willoughby, while the fifth director is to be Mr. St. John, the executor.

The Restrictions to Go Into the Charter.

The provisions thus described indicate a fixed purpose on the part of Mr. Andrews to give to the corporation features that should distinguish it from any other corporation in existence. Not only this; a purpose is evinced to embody these features in the organic law creating the corporation. In other words, the testator directs that they take the form of charter restrictions and limitations upon the powers of the directors, a majority of whom are occupied with public affairs. The directors are not to be left to their own conception of how to fashion the institution and from time to time keep in motion its machinery. They are to find at hand before entering upon their duties an institution, with its various departments, containing in its charter not only injunctions as to the direction in which all money is to be ex-

pended, but also a laying down of the limits within which the board is to apply the funds for building purposes, or for maintenance.

Reasons Why Mr. Andrews Would Not Have a Corporation With Unrestricted Powers.

We may here quote from our brief laid before the New York Court of Appeals:

"This careful man of business kept in mind certain leading features which he meant should characterize the institution to be brought into existence. He knew how subtle and how strong is the temptation that lies in the disposition of a very large sum of money, to be used for the founding of a school, or college. He knew that directors, otherwise sagacious, are disposed to expend an undue amount for the erection of buildings. He was not unaware of a tendency to encroach upon a principal sum at the very outset of putting the plan of construction into operation. We see that Mr. Andrews had his own ideas as to the type of the educational institution which he proposed to establish. He tells us exactly what this corporation is to be. He restricts its powers—in a sensible way, too.

"Advised by counsel of the futility of attaching conditions to his gift, Mr. Andrews decided to put these restrictions into the charter of the corporation to be formed. Here they would be fixed for all time, declaring the wishes of the testator and having force and vitality as a part of the organic law of the institution. By this means he would secure a compliance by directors for all future time with the intentions and purposes that he explicitly prescribes."

The testator expected these limitations in his own words to be put into the charter. We see this purpose in the composition of the directions themselves. Moreover, the language of the last paragraph of the fifth section of the will removes any possible doubt: "The *charter* of the said corporation shall *also* provide," etc. (Rec., 7.)

Mr. Andrews has taken care to prescribe an arrangement

that he thinks can be relied upon to ensure a compliance with the few but vitally important requirements necessary in his opinion for the success of the experiment. It is idle to contend that limitations thus laid down are nothing more than suggestions; that the testator's words are merely precatory.

Mr. Andrews was not content with presenting views that might exercise simply a moral influence over directors who are to handle corporate funds of no inconsiderable magnitude. In distinct and positive terms he requires his executor and executrix to see to it that every one of these provisions in the shape of restrictions upon the powers of the directors *goes into the charter*. (*Fifth paragraph of Will*, Rec., 6, 7.)

We thus see that the institution contemplated by its founder was to be a corporation not of general but of circumscribed powers. Upon these terms only does Mr. Andrews entrust his estate to the management of sundry persons (who may, or may not, be specially fitted to deal with the subject), to be incorporated in Ohio. No corporate body in Ohio, therefore, can legally claim the residue except one whose organic form meets these several requirements. To such a corporation, and to such only, has the testator signified his willingness to turn over a munificent sum of money in order to administer what is at best a new and untried scheme of charitable endowment.

III.

The Charter of the Andrews Institute Confers Special Corporate Powers.

An Objection Considered.

An objection may be raised that an act which seeks to embody restrictions in a charter is not an act *conferring* corporate powers; that it withdraws, but does not confer, power; and consequently that the prohibition of the Ohio Constitution against passing special acts "conferring cor-

porate powers" does not apply to the grant of a charter wherein restrictions and limitations are imposed.

The argument is without force. The constitutional prohibition means that all corporations in Ohio of a certain class shall possess precisely the same powers; that all shall stand upon absolute equality. The prohibition is against granting favors to any one set of individuals. To authorize the forming of a single corporation, whose powers shall be confined within certain specified limits, is to create specially a corporation. This is precisely what the Constitution forbids. Nor is the desired result to be accomplished by indirection.

Why the Prohibition Was Put Into the Constitution.

Says Judge Ranney of the reasons why this prohibition found place in the Constitution:

"It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of making such law applicable to all parts of the State, thereby securing the vigilance and attention of its whole representation; and finally of making all judicial construction of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class." *Atkinson* v. *Marietta R. R. Co.*, 15 Ohio St., 21.

The positive views of the Court in respect to an attempt to evade this constitutional prohibition are well expressed in this opinion.

"A railroad company had no power to sell its franchise. It mortgaged its properties and they were sold under the mortgage. The purchaser obtained a special act authorizing a reorganization of the former corporation."

The Court pronounced the act illegal, saying:

"The constitutional provisions would be of little value if they could be evaded by a mere change of form. These provisions of the Constitution are too explicit to admit of the least doubt that they were intended to disable the general assembly from either creating corporations, or conferring upon them corporate powers by special acts of legislation." *Ibid.*

It is apparent that the policy of the Constitution brings it about that all educational institutions in Ohio are vested with the same powers. Such an institution as Mr. Andrews contemplated we see at once is a marked exception to the general rule.

If the Ohio assembly has attempted to sanction the creation of a corporation whose directors are restrained by the organic law from applying its funds except in the way described in the fifth paragraph of the Andrews will, such legislation would unquestionably be an undertaking to create by special act—a corporation. Let us proceed to ascertain, if we may, precisely what has been the effect of incorporating the Andrews Institute, under the Ohio statute of March 19, 1902.

IV.

If the Copying of the Will Into the Articles of Incorporation Is Held to Meet the Requirements of the Testator in Respect to the Powers of the Directors, the Corporation Becomes One With Special Powers in Violation of the Constitution of Ohio.

When we argued to the Court of Appeals that the Ohio Act of 1902 was unconstitutional, we did so upon the broad ground that the language of the act showed that it had been drawn to meet a special case. There cannot be the slightest doubt that this act of the general assembly was procured solely for the purpose of fitting the form of this particular

will. The objection we urged to the act was that it applies only to a single will. The circumstance that the Member of Congress from the district of which the county forms a part, in which the charities are to be administered, is to be named under the act as one of a board of trustees or directors discloses a purpose of restricting the officials in a peculiar way without warrant for so doing. The legislature perhaps in respect to future wills may have the right to lay down this arbitrary species of classification. It does not appear how a Member of Congress is any better qualified to serve as a director than a Senator. The Member of Congress figures in the Act of 1902 simply because Mr. Andrews had named such an official.

We contended that in respect to any will whose testator had died before the passage of the act, the act was unconstitutional, because the classification set forth in the act was arbitrary, and had no relation to the duties to be performed. The Court, in deciding that the act *seemed* to be constitutional, it will be observed, have not a word to say about the effect of copying a will into the articles of incorporation.

THE UNCONSTITUTIONALITY OF THE ACT OF 1902 SET UP IN COURT OF APPEALS IF IT BE HELD THAT COPYING WILL INTO ARTICLES GIVES EFFICIENCY TO RESTRICTIONS SPECIFIED IN WILL.

We quote a portion of what in our brief before the Court of Appeals we said in support of our contention that the Andrews Institute is not the corporation that the testator directed should be procured to be formed:

"The Andrews Institute, whether formed under the special Act of March, 1902, or under the general law for the creation of corporations, presents a certificate of incorporation which confers upon its corporate members general powers. There is no sign anywhere of a single one of the restrictions and limitations required by the fifth paragraph of Mr. Andrews's will. The act 'to provide for the administration of charitable trusts in certain cases,' after specifying certain

officials and persons, provides that they may constitute themselves a body corporate 'with the *general powers* of benevolent corporations.'" (Folio 179.)

"If it be argued that the act requires that a copy of the will, for the carrying out of whose provisions the incorporation is organized, must be set forth in the articles, and that the restrictions of any such will become thereby a part of the charter, an obvious reply is that nothing in the act provides that a will, or any part thereof, shall in any manner limit or control the general powers that are conferred by the act.

"If, by a stretch of construction, a court shall be persuaded to hold that, inasmuch as it is required that the will be copied into the articles the charter may be treated as containing the testator's directions in respect to the corporation, and that to this extent such directions constitute a part of the charter, and thus limit the general powers conferred, it follows necessarily that each individual charter, so created under the act, becomes a special charter, since each will differs from every other will. Of course, legislation that enables charters of this character to be formed,—one differing in terms from another,—violates the prohibition of the Constitution against special acts conferring corporate powers. Courts look to the operation and effect of a statute rather than to its form in order to determine whether a statute be constitutional or not. (*State* v. *Hibbs*, 38 Ohio St., 199.)

"There is no escape from this dilemma. If the directions contained in the fifth paragraph of Mr. Andrews's will can by any possibility be construed to form a part of the charter of the Andrews Institute, then the Act of 1902 amounts to nothing more or less than a special act conferring corporate powers. We have no reason to imagine that this Court will find that any such result follows from inserting a copy of the will into the articles."

V.

The Articles of Incorporation of the Andrews Institute.

We will now for a moment examine the articles of incorporation of the Andrews Institute (Rec., 11, 12) and the Act of the General Assembly of Ohio, under which it is incorporated. (Rec., 9-11.)

The articles witness that the corporators *desiring* to form a corporation for the purpose of receiving property bequeathed under the will of Mr. Andrews—and that of Mrs. Andrews—and for the purpose of carrying out the charitable purposes of the wills, and of establishing and maintaining the institution therein provided for,—*desiring* to do this, these persons certify:

1. That the wills have been probated; and that the following are copies of said wills:

(The wills are copied verbatim into the articles.)

2. The name—The Andrews Institute for Girls.

3. Located in Willoughby, Lake County, Ohio.

4. Names of the members of the corporation, including Governor, Member of Congress, Mayor, etc.

5. Members and their successors shall constitute the board of directors.

The text of the will of Mr. Andrews discloses what are the "charitable purposes," and what is the 'charitable institution," for the establishing and maintaining of which the incorporators desire to form a corporation.

The Act of the General Assembly, entitled "An Act to provide for the administration of charitable trusts in certain cases," was passed and became a law March 19, 1902. (Rec., 3.) The articles of incorporation were executed May 8, 1902. (Rec., 12.)

There Is No Trust Feature in the Gift to the Corporation.

Although the title apparently confines the scope of the act to the administration of charitable *trusts*, the first section embraces bequests not only for "charitable uses," but for the establishment and maintenance "of any industrial or educational school or institution."

The phraseology is noteworthy, since the Andrews Institute is not a charitable trust. The gift "to the corporation" is direct.

The Act of 1902 Examined.

The first section enacts that whenever it may be provided in such wills that a board shall consist in part of officials of the State, of the county, the officials of any municipal incorporation in said county, and *the Member of Congress for the district of which said county forms a part* or any of such officials * * * such executor * * * and * * * persons * * * "may constitute themselves a body corporate with the *general powers* of benevolent incorporations." (Rec., 10.)

Section 2 declares what the articles shall set forth:

1. A copy of the will or testament for the carrying out of whose provisions the incorporation is organized;

2. The name of the incorporation, which shall include the name of the maker of the will, unless otherwise therein provided for, and

3. The location of such corporation.

Section 3 provides that such officers and persons shall become the members and directors of such corporation, etc.

Nothing in the act provides that injunctions of the will, so copied into the articles, shall have any force. On the contrary, the act (as already seen) confers general powers upon the corporation, and further authorizes the directors to "adopt and from time to time change *such organic rules,* regulations and by-laws as they may deem expedient not inconsistent with"—the provisions of the said will? No,—"the Constitution and the laws of this State." (Rec., 11.)

Act of 1902 Confers General Powers.

It thus appears that the object of this statute is to confer general powers upon a corporation especially favored as to the make-up of its board of directors, which general powers are to be administered by directors who can adopt and *change the organic rules* as they see fit. The act does not provide that a testator's express directions as to the char-

acter of a corporation shall have any control over, or binding force upon, the board of directors. Indeed, although the act is entitled an act to provide for the *administration* of charitable trusts, it is silent about administrating anything. No rule is laid down as to the management of the institution after it shall have been incorporated. That business is left free to the board of directors.

We observe, therefore, that the provisions which Mr. Andrews has enjoined upon his executor and executrix to procure to be put into the charter of the proposed corporation are not only not in the charter of the Andrews Institute, but that they cannot be put there under any authority created by the act of March 19, 1902.

VI.

The Andrews Institute Is Not the Corporation Which the Testator Directed Should Be Procured to Be Formed.

The learned Judge who delivers the opinion of the Court of Appeals does not in distinct terms say that the Andrews Institute was incorporated under the Act of March 19, 1902; but he devotes no little space to the title, and the terms of that act, as well as to a defense of its constitutionality. He also cites Section 4 conferring certain powers upon the Attorney General of the State of Ohio as something important to bear in mind,—a citation that would seem to be irrelevant, if the Andrews Institute were incorporated under any other act (Rec., 51). The opinion does not refer us to a statute other than that of March 19, 1902, under which the Andrews Institute, with its Governor, its Member of Congress, County Treasurer and Mayor, as directors, could possibly have been organized. Lastly, the opinion remarks that the will is copied into the articles of incorporation as

forming an efficient part of the charter. It relies upon this circumstance as sufficient to render our objection unworthy of considering "at length." (Rec., 51.)

We feel justified in saying that the Court of Appeals (if they reached any conclusion whatever on the subject) were of opinion that the Andrews Institute had been incorporated under the Act of March 19, 1902.

We submit that it is proved beyond reasonable doubt that somebody procured the Act of March, 1902, to be passed through the Ohio Assembly, for the express purpose of organizing a corporation thereunder to claim the legacy under the Andrews will; and that the Andrews Institute for Girls was in fact incorporated under the provisions of that statute.

Our Objection Is Not Considered, Because the Court Thought It Unnecessary, in View of the Fact That the Testator's Wishes Are Embodied in the Charter.

The opinion of the Court of Appeals is of considerable length. The portion, however, which disposes of the objection raised by us, that the Andrews Institute is not the corporation that the testator directed the executor and executrix to procure to be formed, is very brief. It reads as follows:

"Many objections are urged to the Andrews Institute for Girls taking the gift because it is claimed that it is not the corporation that the testator directed his executors to procure to be formed. It does not seem necessary to consider these objections at length, in view of the fact that the articles of incorporation do not violate any of the provisions of the will of the testator, and of the further fact that the will is made a part of the articles of incorporation." (Rec., 51.)

THE POWER OF THE ATTORNEY GENERAL DOES NOT EXTEND TO THE CORPORATION DESIGNED BY THE TESTATOR.

The opinion points to certain authority and power lodged in the Attorney General of Ohio:

(1) To enforce the performance of charitable trusts;

(2) To bring proceedings to enforce a devise or bequest.

1. No charitable trust exists under the will of Mr. Andrews. For this reason we fail to perceive the pertinency of the language of the opinion under this head:

"The Attorney General of the State of Ohio has authority by the general statutes of that State to cause proper suits to be instituted to enforce the performance of trusts for charitable and educational purposes, and to restrain the abuse thereof, whenever, upon the complaint of others, or from his own knowledge, he deems such suit to be advisable, or whenever by the Governor, the Supreme Court, or the General Assembly, or either branch thereof, he is directed so to do, and such suits may be brought in his own name on behalf of the State or of the beneficiary of the trust." (Rec., 51.)

The bequest is made direct to the corporation (Rec., 6), which is to receive the residue as its own property, and holds it not as trustee, but as absolute owner. The corporation is private, and it has no visitors. The Attorney General of Ohio has no right to enquire into the affairs of such an institution under powers set forth in the language just recited. That official would decline to have anything to do with the management of a private institution, whose directors do not hold the property in a strict legal sense as trustees.

2. The next clause of the opinion is:

"The statute of 1902, as we have seen, also provides that the Attorney General shall have power to bring proceedings to enforce such devise or bequest whenever he deems such action necessary for the protection and carrying out of the purposes named in such will." (Rec., 51.)

The reference here is to Section 4 of the Act of 1902 (Rec., 11). We submit that to "enforce such devise or bequest" means nothing else than to take steps to have a court declare a devise or bequest valid. Such is the extent of the power granted.

THE REASONS WHY THE COURT DECLARE THE ANDREWS INSTITUTE TO BE THE CORPORATION THAT THE TESTATOR DIRECTED SHOULD BE FORMED.

Seeing that the references to the power of the Attorney General do not furnish a ground for declining to consider our objection, we are thrown back upon the reasons assigned by the Court, viz:

(1) The articles of incorporation do not violate any of the provisions of the will;

(2) The will is made a part of the articles of incorporation.

1. It is hardly worth while to seek to ascertain whether the articles of incorporation do or do not "violate" any of the provisions of the will. They may not violate a single one of these provisions, and yet the Andrews Institute may not be the corporation which the testator directed should be procured to be formed.

2. Saying that "the will is made a part of the articles of incorporation" is equivalent to declaring that the requirements of the will in respect to the corporation to be formed are an efficient part of the articles; that the directions and restrictions contained in the fifth paragraph are operative to ensure a compliance by the directors with every requirement therein intended to be made a part of the charter. Nothing less than this meaning can be assigned to the language of the learned Judge. The Court, in effect, decide that the restrictions upon the powers of the directors are charter restrictions; and, further, that such a construction of the meaning of the Act of 1902 does not render that act uncon-

stitutional, as violating Section 1, Article XIII, of the Constitution of Ohio. (Rec., 26.)

The Court of Appeals have decided, therefore, that the *charter* of the Andrews Institute forbids the directors from using more than one-tenth of the sum bequeathed to it in the erection of buildings; that the *charter* forbids the directors from discontinuing the cooking department in order to apply the funds of the Institute for the education of girls in dramatic art, or in an advanced course of music or painting; that the *charter* forbids the directors from allowing a girl of exceptional merit to continue her course of education, though she be a few months beyond sixteen years of age.

These acts, and others that might be named, the directors have no power to sanction, because the charter forbids. An attempt to depart from the language of the will in this respect would furnish valid ground for a procedure in court to restrain the directors by an injunction order. Such is the result of construing the Act of 1902 as authorizing a private corporation to be organized containing in its charter the restrictions laid down by a testator in a will.

That such an interpretation of the Act of 1902 would render that act unconstitutional and void, as being an act specially conferring corporate powers upon corporations,—is too plain for argument.

VII.

The Testator's Intention With Respect to the Institution for Girls Has Failed for Illegality.

No greater mistake can be made than to conclude that, because a corporation has been organized in Ohio under the name of the Andrews Institute for the education of girls, of which the incorporators are the Governor of the State, and other officials, and the brother-in-law of the testator, who are ready to expend the money for the purpose of carrying

on their institution,—therefore the wishes of the testator are gratified, and the residue should be declared payable to this body of Ohio incorporators.

Mr. Andrews never for one moment thought of turning over a large residuary estate to be expended by a board of directors who should be free to follow their own ideas as to creating and maintaining an institution.

The Smithsonian Institution is standing by the intention of Mr. Andrews. It relies upon the obvious fact that *the safeguards required by the testator are absent from the corporation that is seeking to obtain this money.*

No one can read the will without at once observing that the testator is devising property to a corporation not of the ordinary kind. It is perfectly clear that Mr. Andrews had in mind an institution whose charter should be special in character. Here is the will of a man who evidently has bestowed much thought upon a favorite scheme of his own. It was not at all his purpose that public officials of Ohio should take up the problem of the education of girls, and solve it according to what might be the popular idea of the day. Mr. Andrews himself sketches the outline of a corporation that in his judgment would bring success to this new project in the field of education. It was a special form of corporation that he wanted, and no other. The "Institution" was to be unique.

Two Difficulties to Be Overcome.

Two obstacles presented themselves. One, the almost insuperable difficulty of drawing a will so as to establish a charity, and have the bequest declared valid by the courts of New York.

The other inhered in the subject-matter. It was by no means a certainty that in America girls of the right kind could be induced to attend a charity school.

As to the first obstacle, the time of the execution of the

will immediately followed the upsetting by the Court of Appeals of the carefully prepared scheme of Mr. Tilden's will for a great charity in the city of New York. (*Tilden* v. *Green*, 130 N. Y., 29.) Counsel in that day in New York, when called upon to devise a plan for endowing a charitable institution to be created after the testator's death, could only warn their clients that there was imminent danger that the most skillfully drawn plan of testamentary devise might be pronounced by the courts ineffectual.

The testator must have been apprized of the hazard attending his experiment. He could not have forgotten what had happened in the case of the Stewart Home for Women in New York City. Young women declined to go and live in a home where they imagined that the world would look upon them as paupers. They may have been unduly sensitive, but this exhibition of pride on their part is, after all, something that one can but view with respect.

An institution where girls are to be educated free of cost, and also in many instances supported, would run the risk of not appealing successfully to that class in the community for whom it is especially designed.

Moreover, it might turn out that Mr. Andrews's estate, after payment of debts, would not amount to a sum much more than sufficient to pay the legacies to his relatives.

Because of these and like premonitions the eighth paragraph of the will we find reads as follows:

"In case my intention with respect to the said institution for girls shall because of illegality fail or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution Washington, District of Columbia, to be devoted to the purposes for which it was established."

This is a clause that needs no interpretation.

Mr. Andrews expected that competent counsel would advise his executor and executrix with regard to procuring

an incorporation to be formed in Ohio. He intended that the experiment should be tried of obtaining just such a charter for the institution as his language denotes. He foresaw that the validity of any charter obtained for that institution would inevitably become the subject of an examination by the courts. He names a second choice. He directs that if the Court shall declare that the gift to the corporation which is procured to be formed cannot be legally sustained, the residue shall go to the Smithsonian Institution.

The testator required that his executor and executrix should procure a corporation to be formed. If the gift to the corporation so procured stands the test of legality—well and good. He does not direct his executor and executrix to conduct a series of experiments, in order to ascertain whether it be possible to incorporate an institution such as he wants. On the contrary, there is no proof that he very greatly preferred a girls' school to the Smithsonian Institution; otherwise, he would have employed language directing what should be done as a further step to help the school in case the first corporation formed in Ohio should turn out to be illegal.

We submit that the situation against which Mr. Andrews guarded has actually come about. His intention with respect to the institution for girls fails because of illegality, since the kind of corporation which he has declared to be necessary to take the bequest has not been legally established in Ohio.

VIII.

It Is Impossible for the Testator's Intention to Be Realized in Respect to the Institution for Girls, Since the Constitution of Ohio Forbids That There Shall Be Created a Corporation With Limitations and Restrictions Upon the Powers of Its Directors as Required by the Terms of the Fifth Paragraph of the Will.

We go further. We respectfully submit that the scheme which the testator has constructed for a girls' school cannot legally be carried into effect. If this Court shall be of opinion that the testator's directions in respect to the charter cannot be legally carried out, it is proper, we apprehend, that such conclusion be announced in the opinion. It will be for the interest of all concerned that this Court fully consider and decide whether in any event the scheme for a girls' school can be legally effectuated.

We will state our reasons, trusting that the Court will pardon any repetition of what has already been urged in argument.

1. The most prominent feature of this will grows out of the difficulty which the draughtsman had to encounter in providing for a bequest to a corporation to be called into existence after the death of the testator. The leading case of *Burrill* v. *Boardman*, 43 N. Y., 254, had pointed out the way in which a gift to a charitable corporation, to be created after the testator's death, might be sustained. In that case the bequest had been made to trustees, who were to apply to the legislature of New York for an incorporation of a hospital. An objection was set up that there had been no gift to a corporation. The Court said that the trustees who were to receive the residue would also be trustees of the incorporated hospital; and that there was no need, therefore, of a formal direction in the will to turn over the estate in their hands to themselves as trustees of the corporation.

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The draughtsman of the Andrews will was not undertaking to have a corporation created in New York. Nor was the testator's bounty going to an institution like a hospital, whose management can properly be left to a board of directors, without imposing upon them restrictions or limitations. Here a novel enterprise was to be ventured upon. Instead of giving the estate to trustees, and instead of directing those trustees to apply to the legislature, the draughtsman frames the will so that in the fourth paragraph the gift is complete. It is an absolute gift to a particular corporation to be formed. It is in terms "to the corporation,"—words not to be found in the will in *Burrill* v. *Boardman*. Not only is there no trust, but there is no condition in the words of the gift.

Hence if the testator intended that any conditions, or limitations, or restrictions should govern the directors in the management of the institution, there was no other way to make such restrictions effective than to embody them in the charter of the corporation.

Naturally enough, Mr. Andrews was not going to give this large estate outright to a corporation of general powers, with no directions of binding force upon the officials who were to manage the institution. Accordingly, we find what we expect to find,—the testator impresses upon the corporation certain features, most of them absolute requirements. When he comes to prescribe who shall constitute the board of directors and how the board shall be kept up in future years, he is not so sure that his wishes can be legally gratified, so he provides that the directors shall consist of the Governor, etc., "if and so far as may be consistent with law and practicable."

When the will says "the said institution shall contain," etc., the only meaning we can attach to this language is that "the charter of the said corporation shall provide that the said institution shall contain," etc.

In like manner, when the will says, "not exceeding one-

tenth of the sum," etc., the real meaning is that "the charter of the said corporation shall provide that not exceeding one-tenth of the sum," etc.

Such being the natural, and indeed the only, construction to be given to the wording of these provisions, we are not surprised to find that when the testator comes to deal with another and an important clause—one that assumes to fix upon the appointment of a board of directors—he says "the charter of the said corporation shall *also* provide."

We think it obvious that the testator intended that these several features of his plan should appear in the charter. His imperative directions, indeed, admit of no other conclusion.

A Further Reason Why Mr. Andrews Expected That a Specially Created Corporation Would Be Procured.

2. We are to bear in mind that Mr. Andrews counted upon his wife (who was twelve years younger than himself) outliving him for many years. During her lifetime her brother and herself would attend to the business of having a corporation ready in order to take at the moment that Mrs. Andrews should die. Of this corporation Mr. St. John himself was to be a director. Inasmuch as Mrs. Andrews and Mr. St. John were living in New York, and would probably continue to live there, we find language appropriately used to charge them with the duty of obtaining the corporation in Ohio, and having it in readiness at the appointed time.

The executor and executrix are directed "to procure under the laws of the State of Ohio an incorporation to be formed with *proper powers* for the purpose of establishing an institution * * * for the free education of girls." (Rec., 6.)

Why the words "with proper powers"? Because the

testator means that the directors of the corporation shall not possess general, unrestricted powers. He means that the corporation which they are to look out to have formed shall be, in respect to its powers, adapted to further the design that the testator has been at pains to fashion: a design which finds expression in the explicit language that follows this direction, and describes the particular kind of institution which the testator conceives ought to be incorporated.

We argued this point before the Court of Appeals. That Court, if it had been of opinion that Mr. Andrews did not require these restrictions and limitations to be put into the charter, would most assuredly have said so. As a matter of fact, the Court sustains our contention upon this point. it impliedly has decided that copying the will into the articles *does* carry into effect the requirements of the testator in this particular.

Mr. Andrews uses the expression "my intention with respect to the said institution for girls." A decision in this case is reached by ascertaining just what was that intention. We are convinced that the fifth paragraph with its elaboration of detail and judiciously worded restrictions frees that question from doubt. Mr. Andrews was too sagacious a business man to permit his estate to be handed over to a corporation that should be managed free from the protecting influences of any directions from him. He may have been misled in supposing that a corporation constructed according to his own ideas could legally be created in Ohio. But his injunctions in respect to the institution show that he had an acute and far-seeing conception of what was needed to guard against disastrous failure.

Unless a corporation such as he prescribes can be obtained, he turns to another means of doing good with his money, and bestows his bounty upon the Smithsonian Institution at Washington.

Had the Court of Appeals given due consideration to this point we confidently believe that they would have reached

the conclusion that the bequest to the corporation to be formed had failed because such a corporation could not be legally created in Ohio.

The Difference Between the Fourth and Fifth Paragraphs of the Will.

The charter restrictions that the Court is asked to note are of two kinds—those prescribing

(1) The character of the school—what and whom it shall teach.

(2) The management of its funds.

The will requires that in each particular the board of directors shall be governed by express words to be inserted in the charter.

Upon this point the Ohio counsel take issue with us. We insist that Mr. Andrews makes this an essential feature of his scheme. They argue that the several restrictions, as to which the testator speaks in positive terms, need not go into the charter. They say:

"It is submitted that paragraph five of the will (Rec., pp. 6 and 7) does not require that the details which the testator desired relative to the school shall be expressed in the charter. They do not belong there, but are directions or suggestions as to the management after the corporation is chartered. * * * The language of the will is directory, not mandatory. These details are not of the essence of the gift. The gift (that is, the establishing of an institution for the free education of girls) was the primary object; the special details were a secondary purpose."

Reply Brief for Defendants in Error, in Support of Motion to Dismiss or Affirm, pp. 8, 9.

The contention that Mr. Andrews did not mean that the directions of the fifth paragraph should be in the charter is contrary to the language of the testator, and to the reason of the thing. Mr. Andrews is pointing out to his executor and

executrix what to do. He purposes to bind the directors, and so he distinctly recites what the charter shall contain. He had *a* corporation in mind. Had the Constitution of Ohio permitted, we should long ago have seen a special act passed by the General Assembly authorizing a corporation to be formed, the charter of which would have followed the directions of the fifth paragraph, word for word.

In the closing sentences of the above extract the Ohio counsel are hitting upon the truth, though not correctly applying it. They tell us that the "details" of the fifth paragraph "are not of the essence of the gift." So far as this assertion is to be understood as meaning that no condition is attached to the words of the gift, we accept it.

Not the slightest obscurity attends the language of the will. In the fourth paragraph the testator sets forth all that he intends to say about the terms of the gift. He treats the corporation as if already existing, and gives to it a legacy—precisely as in the preceding paragraph he had given a legacy to his sister Lury—outright and without condition. The Ohio counsel are quite right in saying that the restriction of using not exceeding one-tenth for building, etc., is "not of the essence of the gift." The restriction attaches not to the gift, but to the corporation. It does not affect the giving; its operation is to provide what shall be done with the money after it shall have been received. "The sum devoted to the said institution by the fourth paragraph," and "If, when the said sum shall be received by the said corporation," are expressions that confirm our position that the fourth paragraph gives the residue in a free and unrestricted form—as indeed our opponents, as it seems, have admitted.

The fifth paragraph does not assume to prescribe terms of the gift. The fourth paragraph has arranged for that. The gift is treated as having been made, and the fifth is devoted exclusively to the formation of the corporation. The distinction is obvious, between the language of giving, and the language of directions that provide for forming a cor-

poration to take. What the Ohio counsel style a "primary" and "secondary" object, is nothing other than the two distinct acts of the testator, first, making the gift; second, providing for a corporation to take. By keeping the two apart we clearly perceive in what manner Mr. Andrews designed to effect his purpose of bestowing a munificent sum of money under reasonable safeguards that would, he thought, secure its employment in a manner that should mean success.

Admission by Ohio Counsel That Mr. Andrews's Directions as to the Use of the Money Are Not Binding.

In this frank avowal by the counsel of the Andrews Institute, and by the counsel for the executor, we find confirmation of our fears that the directors of the Ohio corporation, now before the Court (Mr. St. John, executor, and sundry public officials of Ohio), would consider the prescribed requirements set forth by Mr. Andrews in the fifth paragraph of his will as not legally binding upon them. The directors are advised, it seems, that they can proceed as they please with the expenditure of this money, once it comes under their control.

Precisely the danger of this assertion of power on the part of the board of directors the testator has most carefully forestalled. He could hardly have spoken more plainly. He gives his fortune to a corporation that he can trust to take care of it, and judiciously to expend it; but only because it is to be a corporation limited in its powers. If a corporation not thus limited can lay hold of this money, and invest or expend it, just as a board of directors may fancy—in that event, Mr. Andrews says that he wants his estate to go to the Smithsonian Institution at Washington, where he can have no solicitude about the mode in which the fund shall be used.

We are not unmindful that the second clause of the fifth

paragraph of the will (Rec., top of page 7), beginning "said institution shall contain," and ending "ten to sixteen, both inclusive," may be considered as a continuation of the description of the institution which it is the testator's "purpose" to establish.

Had the Andrews Institute, which is now claiming the residue, been formed under the general law, the Governor and others could not officially act as directors (or, rather, if acting individually, could not retire at the close of an official term to make place for official successors), and the will could not be copied into the articles. But these provisions of the second clause of paragraph five, we conceive, might properly be regarded as included in the third division of the contents of the articles, viz: "The purpose for which it is formed," named in Sec. 3236 (Rec., 9). In that event, standing by themselves, these requirements would not have rendered the charter special—since the directors would have been invested with general powers to carry into effect these specified objects, allowable as so many features of a corporation formed under the general law for the free education of girls.

But the Andrews Institute has not been incorporated under the general law. Its articles are drawn up to conform to the provisions of the Act of 1902, which differs in several respects from the general law. The sixth section authorizes the directors to "adopt, and from time to time, change, such organic rules, regulations and by-laws as they may deem expedient, not inconsistent with the Constitution and laws of this State." (Rec., 11.) This seems to mean that while preserving its character as a girls' school, the directors can alter any or all of the features prescribed in the fifth paragraph; or, indeed, can neglect to adopt them, or any one of them.

What is the result? There can be no assurance that a corporation established under the Act of 1902 shall meet the requirements of the Andrews will; and it is certain that the

Andrews Institute, incorporated under the Act of 1902, is not the corporation that the testator has directed should be procured to be formed.

Even if the language of the will permits the executor to procure another corporation to be formed—this time under the general law—such new corporation could not contain in its articles the restriction of the use of the money received by the corporation.

The Management of the Fund.

That the corporation organized under the Act of 1902 is that which Mr. Andrews directed should be formed is proved, says the New York Court, because the will is copied into the articles, and the requirements of the fifth paragraph of the will are in the charter, and as such are operative and effective to carry out the directions of the testator. It follows that the directors would have no power (notwithstanding the corporation had received all the money) to expend a sum exceeding a tenth of the fund in building, and in the purchase of land. The directors have not the general powers of a corporation, to use all its fund as they shall see fit, but a special power to use one-tenth for one purpose and nine-tenths for another purpose. Such is the special power that any corporation (no matter under what law it is created) must possess in order to take the gift under the fourth paragraph of the will. No corporation answers the requirements of the will whose directors are not restricted by the charter in their power to employ the fund.

In this respect the corporation differs from every other corporation in Ohio created under the general law. To state it in different terms, the Andrews Institute is specially created, in order to conform to Mr. Andrews's directions. The Act of 1902 which creates this particular corporation **specially confers corporate power upon it, in respect to the management of its finances.**

But the Act of 1902 cannot specially confer this power. No law in Ohio, conferring corporate power, can confer anything less than general powers. We are to look at effects. If a law assumes to call into being a corporation, that in respect to its organic powers differs from all other corporations organized to carry into effect like purposes, such a law must necessarily be one that specially confers corporate power; and this the Constitution forbids.

The Smithsonian Takes, Since the Gift "to the Corporation" Fails for Illegality.

If this Court shall be of opinion that the restriction as to the use of the fund was directed by the testator to be contained in the charter, then a finding by the New York Court of Appeals that such restriction is legally binding on the directors is equivalent to a finding that a law of Ohio, passed by the General Assembly, has conferred special, and not general, powers on the Andrews Institute for that purpose—and such law violates the inhibition of the Ohio Constitution against passing special laws conferring corporate power. It follows that copying the will into the articles does not have this effect, and consequently whatever power the directors have over the sum to be received from the Andrews estate would be a general, unrestricted power. Hence the Andrews Institute is not the corporation that the testator directed to be procured; his intention fails for illegality, and the sum intended for the corporation the testator had in mind is given by the will to the Smithsonian Institution.

The decision of the Court of Appeals of New York commits this residue to a corporation altogether different in powers from that which the testator meant should take it. Since it appears that Mr. Andrews's plan of establishing a girls' school at Willoughby, Ohio, with certain restrictive provisions in the character of that corporation, is not, under the Constitution of Ohio, legally permissible, the gift to the

Smithsonian Institution takes effect, in accordance with the testator's wishes, as expressed in the eighth paragraph of his will.

We respectfully ask this Court to reverse the judgment of the Supreme Court of the State of New York, and to direct that judgment be entered declaring the Smithsonian Institution as alternative legatee entitled to receive the said residue.

FRANK W. HACKETT,
EDMUND WETMORE,
For the SMITHSONIAN INSTITUTION, and
MELVILLE W. FULLER, as Chancellor of said Institution,
Plaintiffs in Error.

Office Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1908.

SMITHSONIAN INSTITUTION, ETC.,
Plaintiffs in Error,
vs.
GAMALIEL C. ST. JOHN,
As Executor, Etc.
No. 613.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

I.

Counsel for the Andrews Institute (Brief, page 4) say "No court has found that the Andrews Institute was incorporated under the act of 1902."

We quote from the opinion of Mr. Justice DOWLING: "As to the validity of the Act of the Ohio legislature, *under which the Andrews Institute for Girls was formed*, it is not the province of the Courts of this State to question collaterally the credit to be given to the enactment of another State. (Rec., 36.) (Italics are ours.)

II.

Counsel for the Executor argues that the corporation organized in Ohio "is not private and without visitors * * * but a public charitable corporation" (Brief, p. 29). A sufficient answer to this assertion is found in *Ohio v. Neff*, 52 O. St., 404. The Andrews Institute is a private corporation.

III.

Mr. Nathan, counsel for the next-of-kin, has something to say with regard to the practice of New York courts (Brief, pp. 3–4). He seems to argue that the question of the identity of the Andrews Institute with the corporation that the testator intended should be formed, ought not to have been brought up in the Court of Appeals. It is sufficient to say that in our answer (Rec., 13) we denied "that said corporation was procured as directed by the fifth clause of said will." This denial put in issue the allegation of the complaint that the Andrews Institute, defendant, is the corporation procured as directed. The Court of Appeals passed upon the question thus presented.

IV.

Mr. Nathan argues that the State Court may have adopted a construction of the will to the effect that the testator did not intend that his directions should be embodied in the charter as charter restrictions. The labored effort to lend probability to this view of the decision of the Court of Appeals will, we apprehend, fail to bring conviction.

If this Court will examine the opinion of the Court of Appeals, at page 51 of the record, it will see that when the learned Justice comes to meet our objection as to the identity of the Andrews Institute with the corporation which the testator had in mind, the opinion does not pretend to construe the will. It is simply disposing of "objections." It says, in effect, "Your objections are of no weight, for the entire will of the testator is made a part of the articles of incorporation."

Not a word is here said or intimated that these restrictions are not intended by the testator to go into the charter. On the contrary, the statement of the court proceeds upon the theory that the restrictions are intended to go into the charter. The fair, and indeed the only, inference to be drawn from the language used by CHASE, J., is that our objections are value-

less for the reason that the intention of Mr. Andrews is carried out by the copying of the will into the articles.

A single word from the court that Mr. Andrews did not intend these directions to go into the charter would have disposed of our objection. No such word was uttered. Moreover, a second opportunity was afforded for the expression of such an opinion when the court came to deny our motion for rehearing. Nothing of the sort was said.

The State court has virtually decided that Mr. Andrews intended these restrictions to go into the charter, and that they are in the charter because the will is copied into the articles. We submit that there can be no doubt as to the intention of the testator in regard to these restrictions. So far as the question could be argued that Mr. Andrews did not intend the restrictions to go into the charter, opposing counsel have discussed the matter before the Court of Appeals. That court in no part of its opinion has encouraged the view taken by our opponents as to the testator's intention in regard to the powers of the corporation.

V.

Perhaps it is hardly worth while to say of the authorities cited at page 13 of Mr. Nathan's brief, that all of them are of gifts to trustees. They do not apply to the case at bar.

More than once the briefs of counsel maintaining the claims of the Andrews Institute have resorted to decisions upon cases of gifts to charitable uses. Mr. Andrews gave this residue absolutely and directly "to the corporation."

FRANK W. HACKETT,
EDMUND WETMORE,
For SMITHSONIAN INSTITUTION, Etc.,
Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.
JAN 29 1909
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 613.

SMITHSONIAN INSTITUTION and MELVILLE W. FULLER, as Chancellor of said Smithsonian Institution,

Plaintiffs-in-Error,

vs.

GAMALIEL C. ST. JOHN, as Executor and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, et al.,

Defendants-in-Error.

Brief for Smithsonian Institution on Motion to Advance.

In Error to the Supreme Court of the State of New York.

ARGUS PRINTING COMPANY, 29-31 Vesey Street, New York.

Supreme Court of the United States.

SMITHSONIAN INSTITUTION, etc., Plaintiffs-in-Error, vs. GAMALIEL ST. JOHN, etc., Defendants-in-Error.	No. 613. October Term, 1908.

Brief of the Smithsonian Institution Upon the Motion Made by Defendants-in-Error to Advance the Cause for a Hearing.

The Smithsonian Institution will be glad, indeed, if the Court shall advance this cause.

The delay in determining the rights of the contending parties, viz.: The Andrews Institute, and this Institution, under the Will of Mr. Andrews, has been very great. The Institution looked for a considerble delay, but the period actually occupied by the Courts of New York has been so protracted that the Institution is impelled to express the hope

that this Honorable Court may direct a speedy trial. The Institution is not unmindful of the rights of parties in other suits. At the same time, it conceives that the interest of the public warrants the granting of the favor of an advance in this instance.

The large estate of Mr. Andrews has been under the management of a single individual without bond. That this gentleman has faithfully performed the duties is not in the least to be doubted. The tax upon him, however, is necessarily severe, and should anything occur to render him unable longer to perform these duties, the result would be most unfortunate in respect to expense and trouble.

The chief ground upon which we rely, and in respect to which the hearing in this cause differs substantially from that of most other causes, is that the Smithsonian Institution, a Governmental agency, is engaged in work of exceeding interest to the whole country, as well as to foreign countries. If the gift of Mr. Andrews shall be found to belong to the Smithsonian Institution, it becomes of the utmost importance that the fund be made available at the earliest possible date.

The following letter from the Secretary of the Institution will advise the Court why the urgency referred to constitutes the request which is contained in this motion, a reasonable one:

SMITHSONIAN INSTITUTION,

Washington, January 25, 1909.

Gentlemen:

I am advised by you that counsel for the Executor of the estate of Wallace C. Andrews, deceased, has united with the counsel for The Andrews Institute in a motion asking that the United States Supreme Court advance the cause for a hearing at this term.

As is probably known to the Justices of the Court, the United States Government holds in trust the Smithson bequest for the increase and diffusion of knowledge among men, together with certain smaller benefactions received since the foundation of the Institution. Since, under the terms of the Act of Congress establishing the Institution, only the interest derivable from the Fund and its accretions may be devoted to carrying out the large purposes of the founder, it is impossible with this limited income to meet the demands upon the resources of the Institution for promoting researches, explorations and other worthy projects, within the scope of its aims and having an important bearing on the acquisition and dissemination of knowledge.

Should it be determined, however, that the Smithsonian Institution is legally entitled to the residual legacy under the bequest of Mr. Andrews, the Institution would be prepared to accept the fund, and to devote it at once to the accomplishment of many important undertakings which must otherwise remain in abeyance; for which reason it is greatly desired that the result of the decision be ascertained with the least possible delay. It is

therefore hoped that the motion of counsel may be granted.

Very respectfully yours,

Charles D. Walcott,
Secretary.

Messrs. Frank W. Hackett and Edmund Wetmore,
Counsel for the Smithsonian Institution.

We, therefore, respectfully submit that the motion of defendants-in-error to advance should be granted.

FRANK W. HACKETT,
EDMUND WETMORE,
For Smithsonian Institution.

[5088]

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 613.

SMITHSONIAN INSTITUTION and MELVILLE W. FULLER, Chancellor of said Smithsonian Institution,

Plaintiffs-in-Error,

vs.

EMMALIEL C. ST. JOHN, as Executrix of and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, et al.,

Defendants-in-Error.

PAPERS ON MOTION TO ADVANCE.

In Error to the Supreme Court of the State of New York.

Lyons Printing Company, 37-41 Vesey Street, New York.

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Supreme Court of the United States.

SMITHSONIAN INSTITUTION and Melville W. Fuller, as Chancellor of the Smithsonian Institution,
Plaintiffs-in-Error,

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vs.

October Term, 1908,
No. 613. Motion

GAMALIEL C. ST. JOHN, as Executor of and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, *et al.*,
Defendants-in-Error.

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In Error to the Supreme Court of the State of New York.

Now come the defendants-in-error Gamaliel C. St. John, as Executor of and Trustee under the Last Will and Testament of Wallace C. Andrews,

deceased, The Andrews Institute for Girls, the Attorney-General of the State of New York, Volney Rogers, as Ancillary Administrator of the goods, chattels and credits of Lawrence G. Andrews, deceased, Emma H. Andrews, Norman C. Andrews, Edith A. Logan and Julia A. Bruce, and move the Court to take this case out of its order on the docket and advance it for hearing and argument on the merits at the present term, on the ground that it appears from the Agreed Record and the affidavits of Virgil P. Kline, and James W. Hawes, filed herewith:

1. That Wallace C. Andrews, then a citizen and resident of the City of New York, died on the 7th day of April, 1899.

2. By his Last Will and Testament he left, after providing for the payment of certain legacies, the residue of his estate to a corporation to be formed in the State of Ohio for the purpose of establishing and maintaining an institution for the free education in industrial arts of young girls at his former home in Willoughby, Ohio, and for their support in proper cases during education, with a special view toward rendering them self-supporting.

3. In case his intention with respect to the said institution for girls should because of illegality fail, or become impossible of realization, he then gave the sum intended for it to the Smithsonian Institution, to be devoted to the purposes for which it was established.

4. That said Will was duly admitted to probate, and said estate has been duly administered by the

executor named in said Will, and that Two mil- 7
lion dollars or more in cash and other assets are available for the payment to one or other of the institutions above named.

5. That in the year 1903 the Executor, for the purpose of determining the beneficiaries and receiving the direction of the Court in the distribution of the estate, commenced an action in the Supreme Court of the State of New York for the interpretation of said Will; that said case was duly heard, and distribution ordered to The Andrews Institute for Girls. The Appellate Division affirmed such order, as likewise did the Court of Appeals of 8
the State of New York, save as to certain income.

6. That The Andrews Institute for Girls was duly organized under the laws of the State of Ohio in May, 1902, has maintained its organization, and upon the determination and judgment of the said Court of Appeals, took steps for the purpose of carrying out the bequest, which it had theretofore by resolution accepted, and formulated its plans for the acquisition of lands and the construction of buildings thereon suitable for the purposes provided for in said Will.

Said defendants-in-error respectfully ask that this cause be advanced as hereinbefore set forth, 9
upon the ground that the pendency of this cause delays the use of a large fund now available for one or other of said public charitable purposes,

and for this reason a speedy determination of the questions involved is of great public importance.

JAMES W. HAWES,
Attorney for St. John,
as Executor, etc.

VIRGIL P. KLINE, HENRY WOLLMAN, S. H. TOLLES,
Attorneys for The Andrews
Institute for Girls.

EDWARD R. O'MALLEY,
Attorney-General of the
State of New York.

HAROLD NATHAN,
Attorney for Volney Rogers, as
Ancillary Administrator, &c.,
Emma H. Andrews, Norman C.
Andrews, and Julia A. Bruce.

HENRY M. EARLE,
Attorney for Edith A. Logan.

The undersigned, representing plaintiffs-in-error, have due notice of this motion, and hereby waive notice of time of hearing thereon.

FRANK W. HACKETT,
EDMUND WETMORE.

SUPREME COURT OF THE UNITED STATES. 13

SMITHSONIAN INSTITUTION and another,
Plaintiffs-in-Error,

against

GAMALIEL C. ST. JOHN, as Executor, etc., and others,
Defendants-in-Error.

October Term, 1908.
No. 613.

State of New York, } ss.:
County of New York, } 14

Virgil P. Kline, of Cleveland, Ohio, being first duly sworn, says that he is now, and has been since the organization of The Andrews Institute for Girls, which was duly incorporated under the laws of the State of Ohio, one of its attorneys; that said Institute was to be located, by the terms of the Will of Wallace C. Andrews, at the Village of Willoughby, Lake County, Ohio, one of the outlying suburbs of the City of Cleveland, Ohio, said Village of Willoughby being the former residence of said testator and his wife; that said Andrews Institute for Girls was organized pursuant to its charter for 15
the sole purpose of accepting and administering the trust designed for it by the Will of said testator and his wife, the Directors of said Institute being the Governor of the State of Ohio, the member of Congress from the district in which the County of Lake is located, the Treasurer of Lake County, the Mayor of the Village of Willoughby, together with the Executor, Mr. St. John, and two

citizens of the Town of Willoughby, all of whom have qualified and are acting as Directors; that great interest has been taken in the organization of such institution, not only by the Directors and by that community, but by the public of Northern Ohio. That after the decision of the Court of Appeals of New York steps were immediately taken by the Directors looking to the acquisition of real estate and the construction of the buildings necessary to carry out the purposes of the testator, long deferred by the litigation which had been for some years pending; that The Andrews Institute depends entirely for its existence and maintenance upon the funds named in said Will, and nothing can be done until the very large amount of assets, about Three million dollars, awaiting distribution, are definitely known to belong to and will be forthcoming to said Institute; that the purposes of said institution are the free education and training of young girls in such arts as will make them self-sustaining in life, and its establishment and future activities will be of the greatest benefit to the public and a large class of needy young girls who are expected to profit by its advantages; that the funds in the hands of the Executor are ample to establish and maintain this widely useful institution, and the pendency of this cause is all that prevents their being immediately devoted to the purposes designed by the testator.

VIRGIL P. KLINE.

Sworn to before me this 28th day of January, 1909.

Milton A. Willment,
Notary Public,
Kings County.

[L. S.]

Certificate filed in New York County.

SUPREME COURT OF THE UNITED STATES. 19

SMITHSONIAN INSTITUTION and another,
Plaintiffs-in-Error,
vs.
GAMALIEL C. ST. JOHN, as Executor of and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, and others,
Defendants-in-Error.

October Term, 1908.
No. 613.

20

State of New York, }
County of New York, } ss.:

James W. Hawes, being duly sworn, says: That he is the attorney for the defendant-in-error St. John, as Executor, etc., herein, and that he has been such attorney since the death of the testator herein, Wallace C. Andrews, on April 7th, 1899. That said Andrews left a Will which was duly admitted to probate in the Surrogate's Court of the County of New York, on May 22d, 1899, and thereupon said St. John qualified as such Executor and has ever since acted as such. Said Will provided that after the payment of certain legacies the 21
residuary estate was to go to an institution to be incorporated under the laws of Ohio, for the free education of girls between certain ages and for their support in proper cases during education, with a special view toward rendering them self-supporting, but in case his intention with respect to the said institution for girls should because of illegality fail, or become impossible of realization,

then he gave the sum intended for it to the Smithsonian Institution to be devoted to the purposes for which it was established.

That an institution for girls was accordingly incorporated under the laws of Ohio in May, 1902, under the name of The Andrews Institute for Girls.

Thereafter an action was commenced April 8th, 1903, in the Supreme Court of New York, for the construction of said Will, and has been prosecuted with diligence through the Court of Appeals of said State, which affirmed the judgment of the lower Courts, that said Andrews Institute was entitled to the residue of said estate, except the income which accrued thereon from the time of the death of said testator to the incorporation of said Institute, and that the Smithsonian Institution has no interest in said estate.

Thereafter, on a writ of error to the Supreme Court of New York, sued out by the Smithsonian Institution, October 29th, 1908, the record in said cause was brought into this Court.

Thereafter, on January 11th, 1909, this Court, upon a motion to dismiss or affirm, decided that the hearing of said motion should be postponed until the hearing of the cause on the merits.

That substantially all the debts and all legacies of said estate have been duly paid, with the exception of the disposition of the residuary estate, a pending claim in behalf of the Executor, the Executor's commissions, etc.; that the balance, however, available for distribution to one or other of the beneficiaries named in the Will is a very large sum, amounting probably to more than Two million dollars in cash and other assets, which awaits the final determination of the proceedings herein; that the Directors of said Andrews Institute have by

resolution duly accepted said trust and have taken steps looking to the immediate establishment of said institution as contemplated by the testator; that said Andrews Institute, having come into existence only by reason of the bequest, has no funds with which to carry out its purposes, and must necessarily defer further formulation or execution of its plans until it can be definitely assured that it will eventually receive the funds designed by the testator for it. 25

That throughout the ten years which have elapsed since the death of the testator, The Andrews Institute for Girls and the Smithsonian Institution, both of which are of a public character and the operations of which are designed to confer great benefits upon the public, have been deprived of the moneys intended to be given one or other of them by said Will. 26

JAMES W. HAWES.

Sworn to before me this 28th day of January, 1909.

Milton A. Willment,
[L. S.] Notary Public,
Kings Co.

Certificate filed in N. Y. Co.

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Supreme Court of the United States

OCTOBER TERM, 1918.

No. 663.

SMITHSONIAN INSTITUTION and MELVILLE W. FULLER, Chancellor of said Smithsonian Institution,

Plaintiffs-in-Error,

vs.

CHARLES C. ST. JOHN, as Executor and Trustee under the Will and Testament of Wallace C. Andrews, deceased, et al.

PAPERS ON MOTION TO DISMISS OR AFFIRM

In Error to the Supreme Court of the State of New York.

Argus Printing Company, Legal Printers, Albany, New York.

Supreme Court of the United States.

SMITHSONIAN INSTITUTION and another, Plaintiffs-in-Error, vs. GAMALIEL C. ST. JOHN, as Executor of and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, and others, Defendants-in-Error.	October Term, 1908. No. 613. Notice of Motion.

To Smithsonian Institution and Melville W. Fuller, as Chancellor of the Smithsonian Institution, and to Frank W. Hackett and Edmund Wetmore, their attorneys and counsel in this cause:

You and each of you will please take notice, that the undersigned will, on the 4th day of January, 1909, in the court room of the above-entitled Court, in the Capitol, Washington, D. C., at the opening of the Court, or as soon thereafter as counsel can be heard, submit the annexed motion and accompanying briefs.

Dated, December 8, 1908.

JAMES W. HAWES,
HENRY WOLLMAN,
VIRGIL P. KLINE,
S. H. TOLLES,
WILLIAM S. JACKSON,
HAROLD NATHAN,
HENRY M. EARLE,
Attorneys for Defendants-in-Error.

4 SUPREME COURT OF THE UNITED STATES.

SMITHSONIAN INSTITUTION, and Melville W. Fuller, as Chancellor of the Smithsonian Institution,
Plaintiffs-in-Error,

vs.

GAMALIEL C. ST. JOHN, as Executor of and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, The Andrews Institute for Girls; John Cunneen, as Attorney General of the State of New York; Lury Ann Moore; Phebe R. Moore; Gamaliel C. St. John; Gamaliel C. St. John, as Executor of the Last Will and Testament of Margaret M. St. John Andrews, deceased, and Gamaliel C. St. John, as Administrator with the Will annexed of Georgie Boyden St. John, deceased; Volney Rogers, as Ancillary Administrator of the Goods, Chattels and Credits of Lawrence G. Andrews, deceased; Emma H. Andrews; Norman C. Andrews; Edith A. Logan, and Julia A. Bruce,
Defendants-in-Error.

October Term, 1908.
No. 613.

In Error to the Supreme Court of the State of New York.

Come now the defendants-in-error, Gamaliel C. St. John, as Executor of and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, The Andrews Institute for Girls, the At-

torney General of the State of New York, Volney Rogers, as Ancillary Administrator of the goods, chattels and credits of Lawrence G. Andrews, deceased, Emma H. Andrews, Norman C. Andrews, Edith A. Logan and Julia A. Bruce, by their counsel appearing in that behalf, and move the Court to dismiss the writ of error allowed in the above-entitled action, for want of jurisdiction in this Court to entertain and determine this cause. 7

And the defendants-in-error, by counsel, as aforesaid, also move the Court to affirm the judgment to review which the proceedings in this cause purport to have been taken, because although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument, and it is manifest that the writ of error was taken for delay only. 8

The facts upon which this motion is based are set forth in the Agreed Record filed herein and printed by stipulation of the parties.

The grounds upon which the Court is asked to make disposition of this cause upon this motion are:

(a) That it appears from said Agreed Record that no Federal question nor any title, right, privilege or immunity claimed under the Constitution of the United States was involved in the proceedings in the Courts of the State of New York, nor presented to or decided by said Courts. 9

(b) That it appears from said agreed record that no Federal question was suggested, nor was any title, right, privilege or immunity claimed under the Constitution or any law of the United States specially set up or claimed in the pleadings

10 or record in said cause, prior to the final determination thereof by the Court of Appeals of the State of New York, but that such purported claims were first suggested, set up and claimed in a motion for re-argument filed by these plaintiffs-in-error in said Court of Appeals, after its decision in said cause had been handed down, which motion was denied by said Court on the ground, among others, that no Federal question had been raised in that Court.

(c) That if this Court technically has jurisdiction herein, the Federal question is so obviously frivolous, and the writ of error was so manifestly
11 obtained for delay, that the judgment ought to be affirmed at once, so that the large sum of money intended for benevolent purposes under the Will in question, which has already been tied up nearly ten years, may be utilized instead of remaining unavailable until this cause can be reached in its regular order on the docket of this Court.

JAMES W. HAWES,
Attorney for St. John, as Executor, &c.
HENRY WOLLMAN,
VIRGIL P. KLINE and
S. H. TOLLES,
Attorneys for The Andrews Institute for Girls.
WILLIAM S. JACKSON,
12 Attorney General
of the State of New York.
HAROLD NATHAN,
Attorney for Volney Rogers as Ancillary Administrator, &c., Emma H. Andrews, Norman C. Andrews and Julia A. Bruce.
HENRY M. EARLE,
Attorney for Edith A. Logan.

Supreme Court of the United States.

SMITHSONIAN INSTITUTION, ETC.,
Plaintiffs in Error.
vs.
GAMALIEL ST. JOHN, ETC.

No. 613,
October Term, 1908.

BRIEF OF PLAINTIFFS IN ERROR UPON MOTION TO DISMISS.

STATEMENT OF FACTS.

Wallace C. Andrews and his wife perished April 7, 1899, in their dwelling-house, in New York City, in a fire where ten other persons lost their lives. Whether he or his wife died first is not known. Mr. Andrews had no child. His will, executed November 12, 1891, was duly proved. He was then, and continuously at the time of his death had been, a citizen of New York. Mrs. Andrews was twelve years younger than her husband. The will, which named Mrs. Andrews and her brother, Mr. St. John, as executors, devised substantially his entire estate to the executor and executrix in trust, to collect and pay over the income to Mrs. Andrews for her life.

Upon the death of his wife, the testator bequeaths $500,000 to certain relatives. The residue, amounting to $1,300,000 or more (R., 37), he gives, upon the death of his wife, to a corporation which, he says, is further on in the will directed to be formed.

The will (R., 6, 7) proceeds with considerable detail to direct the executor and executrix, as soon as practicable after his decease, to procure under the laws of Ohio an

incorporation to be formed with proper powers for the purpose of establishing an institution in Willoughby, Ohio, for the free education of girls.

The institution, the will says, shall contain certain departments; the school shall be open *only* to girls between the ages of ten and sixteen; not exceeding one-tenth of the sum bequeathed may be used for the erection of suitable buildings. The will provides what the directors shall do, if the one-tenth is not sufficient for that purpose. Further the will says (R., 7): "The charter of the said corporation shall *also* provide . . . for the management of the said corporation by a board of five directors," four to be men holding certain specified public offices, including a member of Congress from the District in which Willoughby is situated.

The eighth clause (R., 7) reads:

"In case my intention in respect to the said institution for girls shall because of illegality fail, or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution at Washington, District of Columbia, to be devoted to the purposes for which it was established."

There are three sets of claimants of this residue: 1. The Andrews Institute for Girls; 2. The Smithsonian Institution; 3. Certain heirs at law of the testator.

The executor, alleging that doubts had arisen as to the construction of the will, and the validity of certain provisions, filed a bill asking the court to determine to whom he should pay this residue. (R., 5.)

The Judge at special term (Dowling) decided that the gift was good to the Andrews Institute (R., 35); and his decision was affirmed by the Appellate Division (R., 36). Upon appeal to the Court of Appeals, the judgment of the Appellate Division was affirmed with a slight modification as to income, accruing before the incorporation of the Andrews Institute. The Smithsonian Institution, among

its grounds for claiming the residue, contended in the Court of Appeals that the Andrews Institute as incorporated was not the corporation that the testator directed should be procured under the laws of Ohio; and therefore that his intention with respect to the institution for girls had for illegality failed. Counsel argued that Mr. Andrews meant that the corporation should contain in its charter certain limitations and restrictions which he had prescribed; that the corporation formed under the statute of 1902 possesses general powers, and that there are no such restrictions in the charter; that the gift was absolute to the corporation, and hence if the gift be upheld, the corporation can do as it pleases with the money,—no limitation now being legally enforcible to ensure a compliance with Mr. Andrews' directions.

The Smithsonian Institution advised the court that should the court incline to consider that copying the will into the articles of incorporation (as provided for in the Ohio statute of 1902) was sufficient to create a corporation whose charter answered the requirements of the will, it should observe that the statute of 1902 does not make the limitations and restrictions of the will effective. And should the court hold that such restrictions and limitations became effective because the will had been copied into the articles of incorporation, counsel for the Smithsonian Institution advised the court that the incorporation would in that event be illegal and void, because such a construction would render the Andrews Institute a specially incorporated institution. The court was cited to the inhibition of the Ohio Constitution against the general assembly conferring corporate powers by special act, being Article XIII, Section 1, of that instrument (R., 26).

The point was clearly stated and amply discussed in the brief, as appears from an affidavit by one of the counsel for the Smithsonian Institution, which accompanied a motion for re-argument (R., 58).

By filing this affidavit the appellants directed the attention of the court specially to the circumstance that their contention in argument had been, as is now set forth; and that such contention was a claim of right set up by them under Article IV, Section 1, of the Constitution of the United States. The Smithsonian Institution asserted its right to have the Ohio Constitution applied to the circumstances of the granting of a charter to the corporation in question. It claimed the right in order that a proper and correct determination should be had of the validity of the bequest to the Andrews Institute. The affidavit respectfully suggested that the argument upon this point submitted by the Smithsonian Institution might have been overlooked, or misapprehended, by the Court of Appeals. It pointed out to the court certain portions of its brief, consisting of five pages at one place, and ten pages at another place, where this position had been taken and a full discussion presented.

The Court of Appeals denied the motion for a re-argument with the single observation "Motion for re-argument denied, no Federal question having been raised in this court." (R., 60.)

POINTS OF LAW.

I.

THE SMITHSONIAN INSTITUTION CLAIMED A RIGHT UNDER THE CONSTITUTION OF THE UNITED STATES, AND THE COURT OF APPEALS DENIED THE RIGHT.

1. Nature of the Right Claimed.

The right which we claimed was to have full faith and credit given to Article XIII, Section 1, of the Constitution of Ohio. The section reads as follows: "The general assembly shall pass no special act conferring corporate powers." (R., 26.)

We submit that the Court of Appeals gave no faith and credit whatever to that inhibition of the Ohio Constitution, although asked so to do, and notwithstanding that their duty demanded of them that they should apply the terms of that section to the determination of the question raised by the Smithsonian Institution. They plainly ignored the same.

We further submit that their declination to apply this section of the Constitution was in itself decisive of the issue. Had the Court of Appeals given to the Ohio Constitution the effect to which it was entitled, they must have decided in our favor.

The Court of Appeals decided that the Andrews Institute was the corporation the testator directed to be formed and that it could take the gift. Had they heeded the terms of the prohibitive language of the Ohio Constitution, they must necessarily have decided that the Andrews Institute could not take the gift. They must further have found that the gift to the Andrews Institute had failed for illegality; that it must have gone by the operation of the alternative bequest (the eighth clause of the will, R., 7) to the Smithsonian Institution.

2. Full Faith and Credit Clause.

A preliminary word may fitly find place here as to the faith and credit to be given in the courts of New York to the Constitution of Ohio. The section referred to of that instrument was duly put in evidence at the hearing before the Court of first instance. (R., 26.)

Article IV, Section 1, of the Constitution reads:

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

By Act of May 26, 1790, Congress prescribes the mode in which acts of the legislature, and the records and judicial proceedings of the courts of the States, shall be authenticated. The act provides that the "records and judicial proceedings, authenticated as aforesaid," shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from which the records are taken. (1 Stat., 122. This is now section 905, Rev. Stat.)

It will be observed that the records as to which Congress is prescribing an effect are those of courts—and those only. Neither acts of the legislature, nor records of such acts, are made by Congress the subject of its action. Congress probably had thought it unnecessary to declare what should be the "effect" of an act of a State legislature, when it had been duly authenticated. As said by WAITE, C. J.,

"Without doubt the constitutional requirement, Article IV, Section 1, that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,' implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home." *Chicago & Alton R. R. v. Wiggins Ferry Co.*, 119 U. S., 622.

The same remark applies to the Constitution of a State—the expression of the people's will in a more enduring form. It is not necessary to have the Constitution of a State authenticated in order that it may be credited in the courts of another State. The question has seldom come up for adjudication, but such authorities as there are agree that a State court takes judicial notice of the Constitution of a sister State. *Curtis v. Gibbs*, 2 N. J. L., 405; *Butcher v. Brownsville Bank*, 2 Kan., 446; *Dodge v. Coffin*, 15 do., 297.

There can be no question, therefore, that it was the duty

of the Court of Appeals to give full faith and credit to the Ohio Constitution, provided only that the section invoked by the Smithsonian Institution had become necessary to the proper determination of the issue.

3. The application of the Ohio Constitutional inhibition was necessary to the rightful determination of the question at issue.

This court is already advised of the point raised by us before the Court of Appeals. We argued that the copying of the Andrews will into the articles of incorporation gave no efficacy to the restrictive words of the testator, because to decide that it did give them efficacy was to turn the articles from a general into a special charter. We put the situation plainly before the court, and invited attention thereto, both in our brief and orally.

Let us quote from our brief, not to prove that we submitted argument (we rely upon our affidavit for that, filed upon motion for re-argument, R., 59)—but because we believe the true effect is there succinctly stated of the decision that the copying of the will into the articles renders the Andrews Institute capable of taking the bequest:

"There is no escape from this dilemma. If the directions contained in the fifth paragraph of Mr. Andrews' will can by any possibility be construed to form a part of the charter of the Andrews Institute, then the act of 1902 amounts to nothing more nor less than a special act conferring corporate powers. But we have no reason to imagine that this court will find that any such result follows from inserting a copy of the will in the articles."

With this contention distinctly put before the Court of Appeals, what did that honorable court conclude as to the effect of copying the will into the articles of incorporation, as bearing upon the question of the right of the Andrews Institute to take this large sum of money, which the testator thought he was bestowing upon a corporation whose

charter contained all the needful restrictions and limitations that his prudence had dictated? The following extract from a long opinion by CHASE, J., is the entire language of the court upon this branch of the case:

"Many objections are urged to the Andrews Institute for Girls taking the gift, because it is claimed that it is not the corporation that the testator directed his executors to procure to be formed. It does not seem necessary to consider these objections at length, in view of the fact that the articles of incorporation do not violate any of the provisions of the will of the testator, and of the further fact that the will is made a part of the articles of incorporation.

"The Attorney-General of the State of Ohio has authority by the general statutes of that State to cause proper suits to be instituted to enforce the performance of trusts for charitable and educational purposes and to restrain the abuse thereof, whenever upon the complaint of others, or from his own knowledge, he deems such suit to be advisable, or whenever by the Governor, the Supreme Court, or the General Assembly or either branch thereof, he is directed so to do, and such suits may be brought in his own name on behalf of the State or of the beneficiary of the trust.

"The statute of 1902, as we have seen, also provides that the Attorney-General shall have power to bring proceedings to enforce such devise or bequest whenever he deems such action necessary for the protection and carrying out of the purposes named in such will.

"We are of the opinion that the plaintiff as the surviving executor of the last will and testament of the testator has procured to be formed an incorporation under the laws of the State of Ohio as directed by said will, and that such corporation has power to take the gift and hold the same for the purposes of its incorporation." (R. 51.)

The learned Judge, it will be seen, points to the fact that the will is made a part of the articles of incorporation as proof that our objection is unfounded. The court has not said that charter restrictions and limitations are not required by the will. It in effect says that they are; but

it finds that a copying of the will into the articles of incorporation complies with that requirement.

The Court of Appeals decides that the Andrews Institute as incorporated is a corporation whose charter contains every limitation (six in number,) upon the powers of its directors that had been specified in the brief laid by us before that court, the sixth and last being the management by five directors, four of whom are to be certain officials.

We had objected in advance that such a finding would amount to sustaining a specially chartered corporation, in defiance of the inhibition of the Ohio Constitution. The Court of Appeals has failed to apply this constitutional inhibition,—has ignored its plain and unequivocal terms.

The court indeed does not assume to deal with the language of the Ohio Constitution, or with the language of any statute of Ohio. There is no question arising here of construction, or of interpretation. The situation bears no analogy to cases where a State court has undertaken to construe a statute of another State, out of which procedure a Federal question does not arise under the full faith and credit clause of the Constitution. *Glenn v. Garth*, 147 U. S., 360, and like decisions, have no application here. In each of that line of cases the State court actually took up a statute, thus recognizing its existence, and in consequence, its validity. It applied the statute to the case in hand, or announced a good and sufficient reason why it did not apply it. Such a is apparent constitutes a giving of full faith and credit to the State statute.

There is not the slightest intimation in the opinion of CHASE, J., that the court had so much as looked at the Constitution of Ohio. The act of the court in taking the position that the copying of the will into the articles is a compliance with the strict terms of Mr. Andrews' will in respect to limitations of the power of the directors of the corporation he directs shall be procured to be formed, amounts to a decision that the Ohio Constitution does not

prohibit the creation of corporations with varied terms to meet the directions of testators as to the special features of the charter that they wish to have called into being.

4. The question which we raised and which the Court of of Appeals determined, may easily be obscured.

We must guard against a misconception of the real question passed on by the Court of Appeals. It is easy to formulate a question, and with plausibility to urge that such was the enquiry determined—and that it was not a Federal question.

Of course, the ultimate enquiry was—Who of the claimants is entitled to the residue? But preliminary questions had to be determined. One of them, and it was fundamental, was—Does the Ohio Constitution forbid the restrictive terms of the Andrews will from operating as a part of the charter of the Andrews Institute? This question was asked of the court and the court answered it.

The Court of Appeals reached the conclusion that the Ohio Constitution does not forbid the restrictions and limitations of the will from operating as a part of the charter. No other inference can be drawn from the announcement by the learned Judge that because the will has been made a part of the articles of incorporation, it is not necessary to decide our objection that the Andrews Institute is not the corporation that the testator directed his executor to procure to be formed.

We use the terms "the court reached the conclusion." We feel confident that the Court of Appeals, as a matter of fact, did not take into account the inhibition of the Ohio Constitution. But here we must presume that it did,—and that it applied the Ohio Constitution, with the result just stated.

Whether the court ignored the Ohio Constitution,—or by virtue of a presumption applied its terms to the construction of the charter of the Andrews Institute, and of the

statute of 1902 under which that incorporation was effected, —it makes no difference. To apply the Constitution in flat contradiction of its plain terms is quite the same thing as to ignore it.

Were the language of the Ohio Constitution open to two interpretations we might concede that no Federal question exists. But it is beyond the range of possibility to conceive of a court deliberately saying that the Andrews Institute possessing a charter in which the restrictions of the will are operative is anything other than a corporation that has been specially created in violation of the express inhibition of the Constitution of Ohio.

The question, therefore, is vital—Has the Court of Appeals, after being advised that a decision in the affirmative would be a denial of full faith and credit to the Ohio Constitution—has that court, we say, pronounced the Andrews Institute to be a corporation that contains in its charter certain restrictions and limitations of the power of its directors, and that still it is a corporation legally established under the laws of Ohio?

The Court of Appeals has so decided.

The decision is not simply wrong. It ignores the Ohio Constitution. It pays no attention whatever to it. The duty of the court was to heed this language of the Constitution of Ohio. Had it done so, there could have been but one outcome,—the court would have decided either that the restrictions and limitations named in the articles had no efficiency,—in which event the Andrews Institute would have been declared not to be the corporation directed to be formed; or else that the restrictions and limitations while they are sought to be made effective, are effective only to render the incorporation one that violates the Constitution of Ohio.

That the court decides as it has done, it seems to us, is proof positive that it could have given no consideration to the terms of the Ohio Constitution.

However viewed, the action of the court amounts to a denial of full faith and credit to the language of section 1, Article XIII of the Constitution of Ohio.

II.

The Federal Question was Properly and Seasonably Raised.

The Court of Appeals gave "due deliberation" to our motion and affidavit, and thereafter entered an order as follows:

"A motion for a re-argument of the above cause having been heretofore made upon the part of the appellants, Smithsonian Institution and another, and papers having been duly submitted thereon and due deliberation thereupon had;

"Ordered, that the said motion be and the same hereby is denied with ten dollars costs, no Federal question having been raised in this court." (R., 60.)

That a State Court holds that the Federal question was not raised is not conclusive. This court will look into the record and judge for itself what was the fact. It may find that the State Court has ignored a claim of constitutional right. Such action is the equivalent of denying the Federal right. *Des Moines Navigation Co. v. Homestead Co.*, 123 U. S., 552; *Chapman v. Goodnow*, do., 540; *Rogers v. Alabama*, 192 U. S., 230, where Holmes, J., says:

"It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights can not be declined when it is plain that the fair result of a decision is to deny the rights. * * * There can be no doubt that if full faith and credit were denied to a judgment rendered in another State upon a suggestion of want of jurisdiction, without evidence to warrant the finding, this court would enforce the constitutional requirement. See *German Savings Society v. Dormitzer*, *ante*, p. 125."

Our affidavit (R., 58) forming a part of the papers upon which the Court of Appeals deliberated sets forth in detail the circumstances of our claiming the right in our brief as well as upon the oral argument (R., 59). There can be no question that the character of the constitutional right claimed by us was brought to the knowledge of the court. It is obvious that the court denied our right. Although the court says that no Federal question was raised, it is apparent that this can be nothing more than the expression of a view entertained by the court of the facts as they had occurred. It is enough to say that even had the court failed to perceive the true character of our claim at the hearing, it was later fully explained in our affidavit, so that there would appear to be no justification for the conclusion announced by the court as to the fact of our raising a Federal question.

This court must judge for itself of the true nature and effect of the order relied upon. *Great Western Tel. Co. v. Purdy*, 162 U. S., 335.

A right may be "specially set up and claimed," though not in terms stated to be a right claimed under the Constitution. *Tilt v. Kelsey*, 207 U. S., 51.

Where the Federal question is raised for the first time in the Supreme Court of a State and that court takes no notice of it, in its opinion, if this court sees that the question was in fact raised, it will take jurisdiction. *Arrowsmith v. Harmoning*, 118 U. S., 194.

The settled practice of this court is to look into the record in order to ascertain whether in fact there was presented to the State court a claim of a constitutional right

"It has been repeatedly held by this court that in reviewing the judgment of the courts of a State, we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision;" Per BREWER, J., *McCullough v. Virginia*, 172 U. S., 117.

The benefit of claiming the protection of the Constitution is not dependent upon an adherence to technical form. It is sufficient if it appear from the record that the right was specially set up or claimed in such a manner as to bring it to the attention of the court. HARLAN, J., *Chicago & Burlington R. R. v. Chicago*, 166 U. S., 231. See language of WHITE, J., in *Mo., Kan., &c., Ry. Co. v. Elliott*, 184 U. S., 534.

It will not be pretended that the Smithsonian Institution did not lay before the Court of Appeals the argument that the Ohio Constitution would prevent that court from holding that the limitations of the Andrews will were operative features of the charter of the Andrews Institute. Counsel had supposed that no such position would be taken by the Court of Appeals. Out of abundant caution, however, the point was made in order to guard against an inference from the circumstance that the act of 1902 had provided that the will should be copied into the articles of incorporation taken out under that act. The only consideration that need detain us now is to inquire whether fairly and squarely there was brought to the attention of the Court of Appeals the circumstance that we were relying upon the Ohio Constitution, and were claiming its protection. That we were so doing we submit is a fact that is incapable of denial.

As already stated, even if the Court of Appeals at the hearing did not perceive in this contention of ours a setting up by us of a claim under the Federal Constitution, our motion for a re-argument, accompanied by an affidavit specifically pointing out the article and section of the Constitution of the United States upon which we had relied at the hearing, was amply sufficient to give the court to understand that we had previously set up and were still claiming our rights under the Federal Constitution.

REPLY TO POINTS RAISED BY DEFENDANTS IN ERROR.

The Andrews Institute Brief.

Counsel for the Andrews Institute print the second paragraph of our amended answer at pages 8 and 9 of their brief. They break off abruptly, however, before the end of the sentence. We supply the omitted words:

"and this defendant denies that said corporation was procured as directed by the fifth clause of said will." (R., 13.)

Their points of law are:

I.

"If there had been a so-called Federal question, it was presented too late." (Brief, 17.)

It was presented in argument at the hearing before the Court of Appeals. Counsel are mistaken in saying (p. 25) that "the attention of the Court of Appeals was first drawn to the so-called Federal question in the motion for re-argument." Counsel seem to think that it was our duty to pronounce the words "Federal question," or, "Constitution of the United States," in the hearing of the Judges, in order to attract their attention.

The record shows that the right under the Constitution of the United States to have the Ohio Constitution applied —was invoked in argument, and that the Court of Appeals were distinctly asked to apply that section of the Ohio Constitution,—asked to give it full faith and credit. (R., 59.)

II.

"There is no Federal question involved in the record inasmuch as it clearly appears that the courts of New York (a) did not refuse to recognize and sustain the validity of the Ohio act of 1902, but did do so, and (b) did not refuse to recognize the binding force of the Constitution of Ohio, but did do so." (Brief, 17.)

Counsel for the Andrews Institute appear not yet to have made up their minds under what statute of Ohio their corporation has been brought into being. They rejoice to declare that the articles of incorporation "were" (to quote from page 5 of their brief) "of the form prescribed by the general corporation laws of the State of Ohio, and there was nothing in them to indicate under what statute or sections of the statutes of Ohio they were filed."

It affords the counsel of the Andrews Institute satisfaction to add—

"The Andrews Institute nowhere alleged that it was incorporated under the statute of 1902, referred to in the Smithsonian's answer."

Their brief tells us that—

"The New York courts did not determine that the Andrews Institute was incorporated under the particular act complained of. There were other general statutes of ample breadth to permit the organization of that Institution in precisely the manner in which it was organized, and it was, therefore, not essential to the final judgment of the court to determine whether the act complained of violated the Constitution of Ohio. (Brief, 29.)

Thus far we are left in the dark, when we would learn under what law the Andrews Institute is endowed with corporate rights. The counsel, however, enlighten us a little by printing in italics the following impressive words (p. 31 of their brief):

"The Ohio statutes provide that a corporation may be formed for any purpose whatsoever, except for carrying on professional business."

At page 34, counsel point out to the court a section under which, if we understand them, the Andrews Institute *might* have been created. Up to the present moment, however, no information has reached us tending to show

under what statute the Ohio counsel are willing to admit that the Andrews Institute obtains its legal existence.

If counsel from Ohio give no certain sound as to the legal establishment of this corporation, it is hardly to be expected that the judges who have had the subject before them would find out what statute is responsible for the incorporation of this Institution. The learned Judge of the Appellate Division does not presume to solve the problem. He remarks:

"Owing to the provisions with respect to the management of the corporation by a board of five trustees, four of whom were to be officials, it was deemed advisable to apply to the legislature for the enactment of a general law under which the corporation could be formed. The act was passed on the 19th day of May, 1902." (R., 41.)

The opinion proceeds with a description of this act, and then observes:

"The Andrews Institute was thereafter incorporated by filing a certificate of incorporation—"

The reader would imagine that the learned Justice was about to conclude his sentence with some such words as "under the terms of that act."

Not at all. In order to avoid committing the court to the position that the Andrews Institute had been incorporated under the act of 1902, the remainder of the sentence reads the

["a certificate of incorporation] which does not specify and is not required to specify the particular statute or statutes under which it was filed." (R., 42.)

If the court will take the trouble to examine the act of 1902 (Exhibit F, at foot of page 9 of the record, and ending on page 11) and then will look at Exhibit G, on page 11, being the Articles of Incorporation, we think they will

not find much difficulty in determining what act it is that the Andrews Institute was incorporated under.

But the learned Justice of the Appellate Division, after saying a word or two about our contention that the act of 1902 was a special act, observes:

"It is quite likely that the corporation could be sustained under other statutes, even if the provisions of the act of March 19, 1902, with respect to the composition of the board of trustees should be declared invalid." (R., 42.)

The origin of the Andrews Institute appears equally mysterious as dealt with by the Court of Appeals. That court do not say that the Andrews Institute was incorporated under the act of 1902; but they do say that the act of 1902 "would not seem to be a violation of the Constitution of that State [Ohio]." (R., 50.)

This conclusion the court announce, because we had contended, apart from any provision of Mr. Andrews' will, that the act of 1902 was a special act, procured by the friends of the proposed Andrews Institute and intended to meet that case only,—that it was founded on an arbitrary method and was in no sense a general act.

The counsel from Ohio, familiar as they undoubtedly are with the corporation laws of that State, have informed us that, such is the flexibility of their statutes, a corporation may be organized under one statute, and should it become convenient to treat a part of the charter as surplusage, that part can be stricken out, and the charter left to stand as if granted under another statute (Brief, 33). It is not for us to dispute the accuracy of this statement, although to our mind such a procedure would seem to wear the appearance of novelty.

The Andrews Institute, if it have legal existence at all, is established under the act of 1902. Notwithstanding that counsel would have it understood that they are not aware under what law of Ohio the Institute is incorporated; and further, that the courts of New York have not

enlightened them on the subject, we can assure them that after all it is of no consequence. Many pages of their brief we submit, with due respect to them, has nothing whatever to do with the point that we raised before the Court of Appeals, and now rely upon for a reversal of the judgment of that court.

What we are trying to find out is, whether a corporation exists in Ohio today procured by the executor to be formed, whose charter contains all the safeguards that Mr. Andrews required that it should contain before he would entrust his money to it. The so-called Andrews Institute, for whom counsel appear, may be legally established, and yet it does not follow that it can take the gift.

Under the scheme of the will, the procuring a corporation to be formed is an entirely different act from the taking by that corporation of the residue. Counsel seem to be of opinion that all that is necessary for them to do is to satisfy the court that the Andrews Institute has been legally established in Ohio.

The recognition of the act of 1902 and of the binding force of the Constitution which counsel speak of, as their second point, has reference only to the objection which we set up to the constitutionality of the act of 1902 as a special act, irrespective of any injunction by Mr. Andrews as to what should be the features of the charter he had in mind for the corporation to be procured to be formed.

No such recognition as this was granted by the Court of Appeals after stating that copying the will into the articles of incorporation rendered it unnecessary to consider the objections which we had raised against treating the restrictions of the will as operative.

III.

"The validity of the act of 1902 was not necessarily involved in the judgment of the New York courts which rightly held that there was ample authority under other general laws of Ohio for the organization of the corporation in question." (Brief, 17, 18.)

This position counsel is pleased to take, since it keeps the veil of obscurity still drawn over the origin of the Andrews Institute. The argument, however, does not meet the objection which we raised before the Court of Appeals. It was not needful for us to assume the burden of satisfying that court that the so-called Andrews Institute had been incorporated under the act of 1902. What we were doing, was arguing that the Andrews Institute as incorporated was not the corporation, with restrictions in its charter, such as the will required the proposed corporation to possess.

IV.

"The act of 1902 complained of was not a special act such as is inhibited by the Ohio Constitution." (Brief, 18.)

Since the New York courts (according to counsel's second point) held the act of 1902 to be constitutional; and since such a holding does not present a Federal question, we need not discuss this fourth point, although the Ohio counsel have devoted several pages thereto.

The act of 1902, as it stands, upon the statute book, we conceive to be a special act. Everybody who knows anything about its history is perfectly well aware that it was got through the legislature on purpose to gratify the terms of Mr. Andrews' will in respect to directors. But the courts of New York apparently have pronounced it constitutional. The Ohio lawyers assure us that it is no great matter whether that act be constitutional or not, since they have in that State other statutes ready, in case of emergency, to sustain the corporate existence of the Andrews Institute.

All that we insist upon is that that act, or any other act, would clearly be unconstitutional, should it be construed to make the terms of Mr. Andrews' will operative so as to restrain the directors as charter restrictions. This position,

which we plainly took, when we argued the cause in the Court of Appeals, has not so far been met by our friends from Ohio.

V.

"If there were any Federal question involved it is clearly frivolous." (Brief, 18.)

"The contention of the plaintiffs in error is that this requirement of the law, if thereby the provisions of the will become a part of the corporate charter, converts the statute into a special act, conferring corporate powers, because each will, to carry out the provisions for which the corporation is organized, will be different in terms." (Brief, 36.)

This statement of our contention approaches nearly to what we undertook to present to the court. We may say, therefore, that the statement practically *is taken from our brief when we argued the cause before the Court of Appeals*—our words being,—"since each will differs from every other will."

Of this contention of ours counsel proceed to remark: "such a claim is clearly frivolous."

We may be excused for protesting that to us the frivolous character of the argument does not seem clear. There probably will never be another instance in the State of Ohio where a wealthy testator gives property to endow an institution, and thinks it desirable to have a member of Congress act as one of a board of trustees. Should such a desire, however, animate some future testator, it is certain that if he has anything to say about the details of a charter, he is not going to adhere to the directions laid down by Mr. Andrews. Whatever he shall say will render the charter peculiar to that particular testamentary bequest. Mr. Andrews entertained his own ideas as to the charter which he directed his executors to procure. He points out in precise terms certain features. How can a charter thus obtained be treated as a *general* and not a *special* charter? The moment that a testator's restrictions become charter

restrictions, become a part of the organic law of the corporation, those corporate powers are special. There is no difference between an act conferring special powers and a special act conferring corporate powers. The test lies in the nature and the character of the corporation that is created.

Let us listen to the exposition by counsel which proves the "clearly frivolous" character of our "claim:"

"It might as well be said that because the other laws of Ohio require the articles of incorporation of each corporation organized thereunder to specifically set forth the particular purpose for which it was organized, the setting forth of such purpose converts legislation from general to special legislation, because of the fact that under its provisions one corporation may be authorized in its charter to carry on a hardware business and another corporation be authorized in its charter to operate a coal mine." (Brief, 36.)

We would speak of Ohio corporation law with less confidence since we have been favored with the Andrews Institute brief. Still, it occurs to us that corporations in Ohio must in many respects resemble the corporations of other States. We are able to distinguish between the purposes for which a corporation is created, and the power that has been conferred upon it; and we venture to assume that all the corporations that our friends have in mind, are clothed with general powers; that not in a single instance are those powers restricted, except by the general laws of the State.

Such being the character of corporations organized under the general corporation laws, we imagine that a particular corporation that should be fashioned so as to conform to the testator's wishes, with the powers of its directors limited in this, that and the other direction, might be considered as a specially created corporation. Nor are we willing to have it thought to be "clearly frivolous" in us to entertain such a conception.

Brief of the Executor.

It will be noted that Mr. St. John styles himself "Executor and *trustee* under the will, etc."

Mr. St. John is not, and never has been, a trustee. The trust that the testator had provided for never came into being, for the reason that Mrs. Andrews perished at the same time with her husband. It is the "executor and executrix" who are directed to procure an incorporation to be formed (R., 6), and there is no duty imposed upon Mr. St. John beyond that of executor.

The points advanced by the counsel for the executor are strikingly similar to those urged by the Ohio counsel.

The court will note that the stipulation as to printing the record ends with the words: "* * * the parties not waiving the right to claim on the argument that certain parts so printed are not material." (R., 1.)

Our object was to reserve the right of saying that there was no occasion to print the "findings of fact" at pp. 19, 20 of the record. Counsel for the executor at pages 18–21 of his brief has much to say about "questions of fact." On page 20 is this statement:

"The Court of Appeals, therefore, could and evidently did regard the question as a question of fact, and as foreclosed by the action of the Special Term unanimously affirmed by the Appellate Division. It, however, thought proper to consider the law applicable to the situation."

We are not sure that we are aware of what counsel means by "the question;" but as nearly as we are able to understand him, he would have us believe that the Court of Appeals treated the question of the legal incorporation of the Andrews Institute as a question of fact. Counsel cites the following language of Chase, J.:

"Although it has been found as a fact in this case that the fourth, fifth and sixth clauses of the will of the testator are valid under the laws of the State of Ohio, and that the corporation so formed in that State has capacity to take the gift under said clause of the will, we will briefly refer to the law of this State which in our judgment sustains such gift." (Brief, 19.)

This language, we confess, is not so intelligible as we would like; but as nearly as we can make it out, it means that the learned judge thinks that a gift to a corporation to be created in future is in Ohio a valid gift—though it would seem that such a finding would be one of law. It further means that the incorporation is legal under the Ohio law, and that the Andrews Institute does exist and is capable of taking the gift.

The 36th finding of fact was that the Smithsonian Institution had capacity to take under the eighth clause. (R., 19.)

We are unable to perceive what any of these findings have to do with the question whether the Andrews Institute is the corporation that the testator directed that his executor should procure to be formed. No finding of fact was made by the Trial Judge on this point, nor does the learned Justice in his brief opinion so much as allude to it.

Of course, Mr. Justice CHASE did not consider that any finding of fact governed the question we had raised that the Andrews Institute was not the corporation that the testator directed his executor to procure to be formed—or he would have so said. It is perhaps not worth while to occupy the time of the court with further remarks about this point of New York practice, but as Mr. Hawes has so much to say about it, we take the liberty to append a word or two from a practitioner who is familiar with the true meaning of the New York rules in this regard. We refer to one of our opponents, Harold Nathan, Esq., who employs this incisive language in his brief before the Court of Appeals:

"The trial court, instead of merely finding the ultimate facts, made no less than one hundred and twenty-five findings purporting to set forth the facts found. A large number of these facts are merely bits of evidence, and, as the Appellate Division said, many facts were found in the decision of the court relating to the question of the survivorship of Mrs. St. John 'with greater detail and minuteness than was justified by the evidence' (fol., 2154), * * * The trial court, however, seems to have been induced by counsel for the successful parties to include in the findings of fact not merely items of evidence, but also mere conclusions of law, utterly barren of any question of fact."

Mr. Nathan then specifies nine instances, and continues:

"It is self-evident that all of the foregoing propositions, although included among the findings of fact are mere conclusions of law, and that there is not a single fact found in any of those propositions. Of course, the trial court could not, by its fiat, convert a mere conclusion into a finding of fact. It is well settled that the Court of Appeals will determine for itself whether propositions announced by the trial court are findings of fact or conclusions of law regardless of what the trial court may have called them. 180 N. Y., 459; 183 do., 302; 113 N. Y., 462.

With respect to all of the findings quoted above we think argument is wholly unnecessary. They are manifestly mere conclusions of law, and practically all of them are repeated among the conclusions of law."

We apologize for trespassing upon the patience of the court. We feared lest the zeal of the counsel for the executor had led him to attribute undue importance to findings of fact. We have thought it would be well therefore to adduce the views of one of his brethren as a corrective.

The point with relation to the presence in these proceedings of the Attorney General of the State of New York deserves a passing comment. Just what that official has to do with the question arising under Mr. Andrews' will

we have never been able to discover. He was invited in, however, it seems, by the executor, as appears from the following words of the complaint:

"That the defendant John Cunneen is the Attorney General of the State of New York, and on information and belief that as such he has or claims to have some interest in the premises by virtue of chapter 701 of the laws of 1893, or otherwise." (R., 3.)

Inasmuch as Mr. Andrews gives the residue direct and absolutely "to the corporation," there is no trust feature in the bequest, as there is no beneficiary. The corporation takes the money outright, just as the testator's sisters take theirs. Such being the nature of the gift, it will be apparent when we consult chapter 701 of the laws of 1893 that that statute has no bearing whatever on this case. It will be found printed in *Allen v. Stevens*, 161 N. Y., 141. It reads as follows:

"An act to regulate gifts for charitable purposes.

"SECTION 1. No gift, grant, bequest or devise to religious, educational, charitable or benevolent uses, which shall, in other respects be valid under the laws of this State, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the land or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the Supreme Court.

"SEC. 2. The Supreme Court shall have control over gifts grants, bequests and devises in all cases provided for by section one of this act. The Attorney General shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the court."

Counsel says that "if the incorporation of the Andrews Institute for Girls were declared invalid it would not help the plaintiff in error. Mr. St. John is alive. If he neglected to proceed, it would be the duty of the Attorney General of New York to apply to the Supreme Court of that State, under Chapter 701 of the Law of 1893, etc." (Brief, 33.)

If this court shall be of opinion that the Andrews Institute as at present incorporated with general and unrestricted powers is not the corporation to which Mr. Andrews meant to give his large estate, we beg to suggest that this result will be no concern of the Attorney General of the State of New York. There will be no trustee missing whose place that official can fill, and no beneficiary that he need trouble himself about to represent.

It may as well be explained here as anywhere that the act just quoted was passed in 1893, because of the feeling excited upon failure of the trusts of the Tilden will. Previously to the passage of this act, the courts of New York had been in the habit of regularly upsetting gifts to charitable uses. A knowledge of this tendency prompted Mr. Andrews to adopt a different mode of endowing the school he contemplated to establish in Ohio. He expressly refrains, as we have seen, from giving the money in trust. He gives it directly *to the corporation.*

Since the enactment of this drastic legislation the courts of New York have been fully as prompt to sustain gifts with charitable purposes in view as they had theretofore been to defeat them.

Counsel for the executor says that if the incorporation of the Andrews Institute

"were declared invalid it would not help the plaintiff in error. There can be no question but that the testator's intention could be carried out by incorporation under the general corporation law of Ohio in force at his death, save, possibly, in respect to the directors he desired to have the management of the school." (Brief, 32, 33.)

We do question this proposition seriously.

In our brief, at the argument before the Court of Appeals, we pointed out no less than five limitations to be embodied by the testator's direction in the charter, in addition to the sixth just mentioned. How could a charter with these five restrictions upon the power of the directors be obtained in Ohio under the general incorporation law? Who ever heard before of a will being copied into the charter of a corporation created under the general law?

Counsel say that Mr. St. John is still alive—and we say sincerely that we hope he may live for many years.

We think that it will "help the plaintiff in error" materially should this court reach the conclusion that the Court of Appeals fell into error in refusing to apply the Constitution of Ohio to the construction of the act of 1902 (or of the articles of incorporation of the Andrews Institute,) which should give operative force to the restrictions named in the will of Mr. Andrews. This court can plainly see that a failure of Mr. Andrews' intentions by reason of the illegality of the gift to the present Andrews Institute would meet the condition upon which by the terms of the alternative bequest the residue would belong to the Smithsonian Institution.

The eighth clause does not provide that illegality shall make his intention *impossible* of realization. The executor is not to conduct a series of experiments to find out whether, at the end of years, an Andrews Institute with these restrictions in the charter, can be legally established. Mr. St. John is not bidden to try to get the Constitution of Ohio amended.

What the testator meant was that if after taking legal advice the executor, upon procuring a corporation to be formed, shall find that it cannot legally take, then the money is to go to the Smithsonian Institution.

It is ten years, lacking a few months, since Mr. Andrews died. A fair trial has been made by his executor to have

a corporation established in Ohio in order to meet Mr. Andrews' requirements. If it is found that the corporation as now organized can not take the bequest, the intention *has* failed for illegality within the meaning of what the testator had in view. Mr. Andrews knew the work the Smithsonian Institution is doing, and he would be proud, undoubtedly, to be enrolled among its benefactors, few as they are. We are contending that Mr. Andrews' wishes be observed; and we feel confident that he would not hesitate a moment in his choice between a corporation whose directors (most of them in public life) are under no legal restriction in the expenditure of this princely sum of money,—and the Smithsonian Institution.

Brief in Behalf of the Next of Kin.

Mr. Harold Nathan files a brief in behalf of Norman C. Andrews *et al.* The points which are concisely stated are those already replied to. They do not include the main contention upon which our writ of error is founded. No demonstration is presented of the fact that the Andrews Institute is the corporation that the testator intended should take the gift.

Mr. Henry M. Earle argues in behalf of Edith A. Logan. He, too, thinks our "appeal" is "frivolous and without any merit whatever" (Brief, 5). We are able to argree with one statement he makes at page 2, as follows:

> "The Act of the general assembly of Ohio, of March, 1902, appears on pages 9 and 10 of the Record. The Andrews Institute for Girls was incorporated under such act, and the charter of the Institute conforms in every respect to the terms of said act."

Mr. Nathan in his brief (p. 26) before the Court of Appeals has well said:

"A comparison of the articles of incorporation with the Act of the Ohio Legislature enacted in 1902 shows, as we think, conclusively that that institution was incorporated not under the general law but under the special act of 1902. The court will have to close its eyes to the most obvious facts to presume otherwise. In other words, it was necessary to resort to special legislation * * * ."

It is an interesting circumstance that the New York lawyers do not close their eyes either; they see more clearly how the Andrews Institute came to be incorporated than do the Ohio counsel, who were on the spot when the work was accomplished.

We have taken the liberty to append to this brief (already too long) a memorandum prepared at the time of our application to Mr. Justice Peckham for the allowance of a writ of error. This paper, as may be supposed, presents throughout the same argument as that contained in this brief, advanced, however, in a little different language. There will be found one or two instances where certain considerations have taken a slightly different form, and appear with a fuller treatment.

Believing, as we do, that Mr. Andrews' wishes can be carried out only by a reversal of the decision of the Court of Appeals of New York, we respectfully submit that the motion to dismiss should be overruled.

FRANK W. HACKETT,
EDMUND WETMORE,
For the Smithsonian Institution.

MEMORANDUM *IN RE* ANDREWS WILL.

The Smithsonian Institution submits that it is entitled to a writ of error to the Supreme Court of the State of New York for the following reasons:

The procedure was upon a bill filed by an executor to obtain construction by the Court of the residuary clause of a will. The testator gave his estate to trustees for the support of his wife for life. At her death he gives the residue, after payment of $500,000 to legatees, to a corporation which his executors are directed to procure during his wife's lifetime, and that of her brother, to be formed under the laws of Ohio, for the establishment of a girls' school. The gift is direct to the corporation. It has no trust features, but is a bequest outright.

The testator specifies what this corporation is to be. It is to educate girls of a certain age in particular branches. The proportion of money to be used in the erection of buildings is stated, and other limitations and restrictions upon the use of the fund are set forth in the will. The charter shall also provide (the will so reads) for the management of the corporation by a board of directors who, if consistent with law, shall be for the most part public officials of the State and County.

Testator's wife died when he did, in a common disaster. Her brother, the surviving executor, it seems, procured an act to be passed by the general assembly of Ohio, in 1902, which permitted the officials, as suggested by the testator, to become directors of an incorporation. This act of 1902 purports to be general in terms. An incorporation was effected under it, styling itself the Andrews Institute. This corporate body is a party to the suit, and it claims the residuum.

The testator evinces a doubt whether his plan would

succeed to create this institution in Ohio. He says: "In case my intention with respect to the said institution shall, because of illegality, fail or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution at Washington."

At the hearing, the Smithsonian Institution raised the objection that the corporation styling itself the Andrews Institute was not the corporation that the testator had in mind—it was not the corporation that the testator had directed should be procured to be formed.

We said that the testator required the charter of the proposed corporation to contain certain limitations and restrictions which we named. We pointed out that by the articles of incorporation the Andrews Institute was vested with general powers; it had no charter restrictions such as the testator explicitly says shall be procured as a check upon the directors' use of the money. We argued that this was not a gift on condition, nor was it a gift to trustees, but a direct and absolute gift to the corporation. That in order to ensure a compliance with his wishes the testator had adopted the expedient of fixing in the charter itself these several restrictions and limitations of the power to be exercised by the directors.

We anticipated an argument that might be advanced in favor of treating the incorporation of the Andrews Institute as a compliance with the terms of the will. We said that if by any possibility the Court should incline to hold that the limitations and restrictions set out in the will are operative because the will itself is copied into the articles of incorporation, the act of 1902 so providing, it would follow that the Andrews Institute thus created would be not a corporation with general powers, but a corporation with certain special powers, since each will so copied into a charter has its own scheme of extent of corporate power. We then pointed out to the court that if operative force should thus be given to the restrictive language of the will (though

the act of 1902 does not say in terms that copying the will into the charter shall have that effect), the act of 1902 would become obnoxious to the prohibition of that clause of the Constitution of the State of Ohio which declares that "the general assembly shall pass no special act conferring corporate powers."

In other words, we argued that the Andrews Institute cannot be regarded as containing in its charter the restrictions and limitations that the testator said it should have, for if it be so regarded, then the act under which its charter is taken out is unconstitutional.

We presented the dilemma to the court both in our briefs and orally. There could have been no overlooking or mistaking our position. We distinctly argued that a corporation with special powers could not be legally created in Ohio. What the New York Court of Appeals said was this:

"Many objections are urged to the Andrews Institute for Girls taking the gift, because it is claimed that it is not the corporation that the testator directed his executors to procure to be formed. It does not seem necessary to consider these objections at length, in view of the fact that the articles of incorporation do not violate any of the provisions of the will of the testator, and of the further fact that the will is made a part of the articles of incorporation.

"The Attorney-General of the State of Ohio has authority by the general statutes of that State to cause proper suits to be instituted to enforce the performance of trusts for charitable and educational purposes and to restrain the abuse thereof, whenever upon the complaint of others, or from his own knowledge, he deems such suit to be advisable, or whenever by the Governor, the Supreme Court, or the General Assembly or either branch thereof, he is directed so to do, and such suits may be brought in his own name on behalf of the State or of the beneficiary of the trust.

"The statute of 1902 as we have seen also provides that the Attorney-General shall have power to bring proceedings to enforce such devise or bequest whenever he deems such

action necessary for the protection and carrying out of the purposes named in such will.

"We are of the opinion that the plaintiff as the surviving executor of the last will and testament of the testator has procured to be formed an incorporation under the laws of the State of Ohio as directed by said will, and that such corporation has power to take the gift and hold the same for the purposes of its incorporation."

The central fact to be observed in this treatment of our position as to the corporate character of the Andrews Institute is that the court decides that a copying of the will into the articles of incorporation carries with it the restrictions and limitations that the testator directs shall go into the charter. Otherwise, there would be no pertinency in the reference by the learned judge to the power of the Attorney-General of Ohio to enforce the performance of a trust.

Precisely how the provision with reference to enforcing the devise or bequest becomes relevant, we do not perceive. The statute of 1902 is entitled "An Act to provide for the administration of charitable trusts in certain cases." The language of Section 4, being the section evidently that the court had in mind, reads as follows:

"The Attorney-General of the State of Ohio shall in his official capacity have power to bring proceedings in any court of record to enforce any such devise or bequest, whenever he deems such action necessary for the protection and carrying out of the purposes named in said will and testament without waiting for the organization of such corporation."

It is clear that the New York court starts with the assumption that the restrictions of the will *are in the charter*, and concludes that by virtue of their being there the attorney-general of Ohio has the power to see to it that these restrictions are complied with, the duty of the directors to conform thereto being in the nature of a trust.

Whatever the court may have meant by its reference to the powers of the attorney-general of Ohio, the fact remains that the underlying ground of its decision that the Andrews Institute is the corporation directed to be formed, is that the articles of incorporation contain certain operative restrictions which perform the office of safe-guarding the funds given by Mr. Andrews—a clear admission that the corporation so created has been specially created under a law of the general assembly of Ohio.

At the risk of repetition, let us remark that what we did when we argued the cause was to invite the court's attention to the Ohio Constitution and ask to have it applied should a certain construction be given to the statute of 1902. It will be observed that the court has given that construction to the act of 1902 and paid no attention whatever to the language of the Ohio Constitution. We took occasion anew, upon filing a petition in the Court of Appeals for a rehearing, to point to that clause of the Ohio Constitution and to say that in neglecting to apply it the court was not giving faith and credit to the Ohio Constitution, which forbids the general assembly from passing a special act to confer corporate power. We claimed our right under the Federal Constitution to have the restraining influences of the organic law of Ohio applied as a test whether the Andrews Institute was the corporation that the testator directed to be formed or not. Had the New York court given faith and credit to the Ohio Constitution, it would not have held that the circumstance that the will had been copied into the articles of incorporation rendered it unnecessary for the court to consider our objection that the Andrews Institute incorporated under the act of 1902, is not the corporation that the testator intended should take the residue.

WAS A FEDERAL QUESTION PRESENTED TO THE NEW YORK COURT, AND WAS THE RIGHT OF THE PARTY PRESENTING IT DECIDED AGAINST HIM?

The rule is that there must be some title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised, under the United States, and the decision be against the title, right, privilege or immunity specially set up, or claimed, by either party under such constitution, treaty, statute, commission or authority. *Jurisdiction and Procedure of the Supreme Court of the United States* by Hannis Taylor, pp. 329, 330.

We start with the proposition that—

If it shall appear that the Court of Appeals of New York failed to give full faith and credit to the Constitution of the State of Ohio, and further, that such failure had the effect to decide the case—then a Federal question is presented.

We must show:

1. That a claim of the right was made by us before the court that proper effect should be given to the Constitution of Ohio, and that this claim was denied;

2. That the record shows that the claim was made, and that the court refused to give the Ohio Constitution the faith and credit to which it was entitled.

Let us endeavor to ascertain just what right it was that we set up. Our claim was made in the course of argument. We relied on the plain language of the Constitution of Ohio. We advanced the argument that the special features which the testator had in mind could not be embodied in a charter, because if they were, the Ohio Constitution, which requires all corporations to be alike in their power, made null and void any legislation that would undertake to say that such language in a charter should be operative.

Nowhere has the court announced that the testator did

not require such restrictions and limitations to be put into the charter of the corporation which he had in mind. The language of the will is too clear to admit of a decision to that effect. The court of New York has decided that the Andrews Institute is entitled to the residuum, because it is the corporation which the testator intended should have it. It has decided that the testator meant that the Andrews Institute should have it, because the charter of that corporation contains the limitations and restrictions that the testator has required. It has decided that the charter contains these limitations and restrictions, because, as it says, the will is made a part of the articles of incorporation.

It therefore becomes a vital question whether the language of the will thus copied into the articles is really operative and effective to restrain the directors in their management of the fund given to the corporation.

The New York court says that it is. It inferentially says so, because it tells us that the fact that the will is copied into the articles is a sufficient answer to our objection that the limitations of the will are not a part of the charter.

A reason we had advanced for our contention that the wishes and requirements of the testator are not embodied in the charter (and therefore not binding on the directors), is that the Ohio Constitution forbids the creating in that State of a corporation with special powers. We quoted from an opinion of RANNEY, Judge, assigning the reasons for this constitutional restriction—the policy being to have no favors extended, and to ensure that all corporations have exactly the same general powers, no more and no less.

"It was intended to correct an existing evil and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of making such laws applicable to all parts of the State, thereby securing the vigilance and attention of its whole representation; and finally of making all judicial construction of their powers, or the restrictions imposed

upon them, equally applicable to all corporations of the same class." *Atkinson vs. Marietta R. R. Co.*, 15 O. St., 21.

It became the duty of the New York court, therefore, to apply the terms of the Ohio Constitution to the solution of the question whether the corporation be that particular corporation which the testator directed should be procured in Ohio to be formed.

Let us for a moment consider the objection that may be urged that no Federal question is here involved. It is said that the construction of a will is wholly for a State court to deal with—that the New York court has decided that the bequest to the Andrews Institute is good, and that such a conclusion on the part of the court is in no sense the determination of a Federal question.

Is this a correct way of viewing the point on which we rely? That the question, standing by itself, whether the Andrews Institute be or not the corporation which the testator had in mind, is exclusively for the New York court to decide, we freely admit. We further concede that ordinarily the decision of that question would not involve an enquiry under the Constitution of the United States. We say "ordinarily," because it is an unusual thing for such a question to admit of a right, title or privilege to be set up under the Constitution of the United States.

Had the New York court decided that Mr. Andrews did *not* require certain limitations and restrictions to be embodied in the charter of the corporation to which he was to give the residue of his estate, that decision, however erroneous in fact, would have shut out any right of the Smithsonian Institution to complain that a Federal question had been ignored.

But the New York court did not so decide. It was engaged in construing a will—directing an executor how to distribute an estate. The New York court has decided

that the objection we urge, that the Andrews Institute is not the corporation Mr. Andrews intended should be procured under the laws of Ohio to be formed, is not a valid objection because (as the court says) the will is made a part of the articles of incorporation. This mode of disposing of our objection can bear but one interpretation. It is that in the opinion of the court the copying of the will into the articles of incorporation ensures the accomplishment of the testator's wishes, and has the effect of constituting these restrictions charter restrictions, as he intended that they should be.

This conclusion reached, our objection that the Constitution of Ohio forbids the conferring of special corporate powers came up for the New York court to pass upon. The court, however, did not pass upon it. It simply ignored our claim that the requirement of the Ohio Constitution be observed.

That we relied upon a certain section of the Ohio Constitution, and that we asked to have it applied to the determination of the question whether the Andrews Institute were the corporation directed to be procured in Ohio, cannot be seriously questioned. We did so in a manner to comply with the requirements of the Supreme Court in respect to the needful steps to be taken to entitle the losing party to his writ of error.

"It is sufficient if it appears from the record that such right was specially set up or claimed in such a manner as to bring it to the attention of the court." Per HARLAN, J., *Chicago, Burlington R. R. vs. Chicago*, 166 U. S., 231. This language is cited with approval by WHITE, J., in *Mo. Kan. Ry. Co. vs. Elliott*, 184 U. S., 534.

We do not pretend to say that every time a constitutional claim is set up in argument the case (so to speak) takes on a Federal aspect. The claim of right under the Constitusion must be such as is directly involved in the issue, and its denial must decide the case.

The New York court was obliged to take notice of the Ohio Constitution because we brought it to its attention in argument. We did not ask the New York court to construe the meaning of the Ohio Constitution, nor has it assumed to do so. That court was requested to apply the plain terms of the Ohio Constitution to the instance of a corporation created with features different from other corporations, owing to the fact that Mr. Andrews' will had been copied into, and made a part of, the articles of incorporation of the so-called Andrews Institute. The New York court virtually has said, Here is a corporation whose charter contains all the restrictions and limitations that the testator directed that it should contain. Counsel for the Smithsonian Institution had seasonably declared to the court, In the event that you shall decide that such is the effect of copying the will into the charter, we interpose an objection that such cannot be its legal effect, because the Ohio Constitution forbids the general assembly to pass an act which shall accomplish such a result.

The situation then is reduced to this—Did our contention amount to a setting up of a right under the Constitution of the United States? The answer turns upon the true meaning, in this connection, of the language of section one, article five of the Constitution.

"Full faith and credit shall be given, in each State, to the public acts, records and judicial proceedings of every other State."

We submit that under this clause we have the right to expect of the New York court that it will give to the language of the Ohio Constitution the force and effect that an Ohio court would give. It must recognize the existence of that section of the Ohio Constitution. It must apply that provision to test the validity of the charter of an Ohio corporation, when such validity has been challenged by a party to the record.

Plainly the New York court has not done its full duty. Even had the court said in its opinion that the Ohio Constitution does not apply we would not have been concluded, *since it is apparent that it does apply;* to say that it does not would have been mere evasion. But the New York court has *not* said that the Ohio Constitution does not apply. It has neglected to pay attention to our objection. It has kept silent as to the effect of the Ohio Constitution.

"A right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim and avoids all reference to it, is as much against the right within the meaning of section 709 R. S., as if it had been specifically referred to and the right directly refused." Per WAITE, C. J. *Chapman vs. Goodnow*, 123 U. S., 548.

Let not our attitude be misunderstood. There is a fallacy in the suggestion that the New York court is not passing on a Federal question when it decides that the Ohio Constitution does not apply. Suppose we assume that it has actually so decided, though we believe the fact to be that it let the question go by without really deciding it.

Confronted with our claim that the inhibition of the Ohio Constitution made it impossible to say that the Andrews Institute contains in its charter the several restrictions and limitations enjoined by the testator, the court, as we have already said, was obliged to give full faith and credit to the organic law of Ohio. There can be no doubt that such a specially created charter is forbidden in that State. It follows therefore that the court has not met that obligation.

If one could conceive of such a declaration, let it be im-

agined that the New York court had said, in its opinion, "We think that the Ohio Constitution does not forbid the creation of a specially incorporated body, such as we find the Andrews Institute to be." Would that announcement be a decision from which we could not obtain relief, because no Federal question had been involved?

A State court may not ignore the constitutional inhibitions of a sister State, while engaged in passing upon the question of the legal existence of corporate powers thought to have been created in that State. It cannot pass these inhibitions by in silence. Nor can it be heard to say that they have no application to the case in hand, when everybody sees at a glance that they do apply, and are controlling. An omission to recognize and abide by the language of the State Constitution, thus brought to its attention, is surely a failure to observe the obligation to "give *full* faith and credit" to the public acts and records of a sister State.

The Question Was Fairly Presented by the Record.

We appealed to the Ohio Constitution in our argument, both orally and in printed briefs. Again, in our motion for a rehearing we reminded the court that we had previously relied upon the terms of the Ohio Constitution, and upon its conclusive effect as regards the character of the Andrews Institute, in respect to containing certain charter restrictions.

What the Supreme Court of the United States would learn is—Does the record disclose the fact that the right to have the prohibitory language of the Constitution of Ohio applied to the statute of 1902, in respect to the creation of the Andrews Institute, was called to the attention of the State court in such a manner that that court must have been made aware that the parties were claiming a right under the Federal Constitution?

There can be no room for doubt. The New York court did not look upon this contention of ours as the submission of a Federal question, for it says so in denying a motion for re-hearing. But this action of the court is not conclusive. *Des Moines Navigation Co. v. Homestead Co.*, 123 U. S., 552.

The fundamental requirement is that a Federal question was actually raised, that it was pertinent, and that the State court had an opportunity to pass judgment upon it.

All of these conditions were present in the case at bar. We distinctly raised the point, dwelt upon its weighty significance and claimed that it was of controlling importance. In the petition for a re-hearing, the section and article of the Constitution was pointed out upon which we relied, and the court reminded that our argument at the hearing had dwelt upon this feature as worthy of very careful attention.

THE DECISION OF THE QUESTION AS TO THE FAITH AND CREDIT TO BE GIVEN TO THE OHIO CONSTITUTIONAL INHIBITION WAS ACTUALLY NECESSARY TO THE DETERMINATION OF THE CAUSE.

If the Andrews Institute does not in its charter contain the limitations and restrictions that the testator directed should be put into the charter of the corporation he meant should be formed in Ohio, then it is not the corporation that the testator had in mind, and it can not take the bequest to the exclusion of the Smithsonian Institution.

The New York court had to decide whether the charter contained the prescribed restrictions. It did decide. The court said that the charter contained those restrictions because the will had been copied into the articles of incorporation.

It is these words of the opinion that fix to a certainty what the court decided. It held that our objection was not sound. In so holding it necessarily held that the

Andrews Institute legally exists in Ohio, as a corporation specially created under the Act of 1902; in other words, it has held that the Ohio Constitution does not prevent the general assembly from authorizing the creation of a corporation with special powers.

Obviously, the disposition of the residue—the determination whether it goes to the Andrews Institute, or to the Smithsonian Institution—has turned upon the view taken by the New York court as to the effect to be accorded to the inhibition of this section of the Constitution of the State of Ohio.

It is true we are assuming that only one meaning attaches to the words: "The general assembly shall pass no special act conferring corporate powers," and that that meaning is that no corporation in Ohio (since the adoption of that Constitution) can be created under any other than a general law; and if the statute of 1902 be a general law, then the provision of that statute requiring that all wills shall be copied into the articles of incorporation does not mean that the restrictions named in every such will shall become charter restrictions, otherwise it would violate the Constitution. No other meaning of this language of the Ohio Constitution is conceivable.

We are met with the criticism that the question whether the copying of a will into the articles makes the restrictions of the will operative as a charter restriction is not a Federal question. We do not contend that it is. But we say that the moment the New York court decides that such copying does make the restrictions operative, it must perforce take another step and decide that the Ohio Constitution does not forbid the creation of such a corporation.

For the New York court to assume to determine that the Ohio Constitution does not forbid the creation of such corporations, is not to construe the meaning of the language of the Ohio Constitution; or to decide the question of its application, it is *to deny faith and credit to that instrument.*

Such must be regarded as the logical effect of the action of the New York court, otherwise a court may at pleasure set aside and render null and void this provision of the Federal Constitution by simply ruling that the record appealed to does not apply.

Let us illustrate our meaning :—

A brings suit against B on an account. B pleads set-off against A in a certain amount, and offers the record of a judgment in favor of B against A obtained in another State. The court ignores the record of the foreign judgment, and enters a judgment against B, in favor of A, for the full amount by him claimed. Had testimony been submitted to the effect that the A named as plaintiff in the foreign judgment was a different individual from A, the plaintiff to the suit at bar, it is conceivable that the court could ignore the set-off; or, could disregard it if it had not been properly pleaded; but if the records show that the court declined to give credit to the record the proceedings would present the instance of the violation of a constitutional right belonging to B.

When B, in the suit supposed, offers his certified copy of the record of the judgment obtained by him in another State, it is not necessary for him to accompany his offer with a statement that he is relying upon a clause of the Federal Constitution. His act is sufficient in itself to show that he had set up a right, and that the court had denied him that right.

There can be no essential difference between the claim thus set up by B and the right set up by the Smithsonian Institution at the hearing in the New York State court. Let it be conceded that all presumptions favor the conclusion that the State court has correctly decided the questions submitted. It still remains that the court has neglected to take notice of a claim set up by the Smithsonian Institution. The opinion is not silent on the subject. It declares that the objection that the Andrews Institute is

not the corporation the testator directed to be formed, need not be considered at length, because the will is copied into the articles of incorporation. Here is a plain neglect to take into account the prohibition of the Ohio Constitution. The language of that prohibition is not capable of being misunderstood. Had it been considered, the result must have been to declare the charter to be one that does *not* contain the restrictions and limitations which the testator took pains to direct should be contained in the charter.

It may be argued that the State court in deciding that the corporation formed under the statute of 1902 was the corporation meant by Mr. Andrews—was deciding a non-Federal question. True, the question as to the character of the corporation is a non-Federal question, but in order to determine it the court had first to enquire what effect the Ohio Constitution has upon that clause of the statute of 1902 which provides that the will shall be copied into the articles of incorporation. To determine this enquiry the court came under an obligation to give effect to the Ohio Constitution, it having been asked to do so by the Smithsonian Institution. It appears, and the proposition cannot be successfully denied, that an application of the Ohio Constitution to the situation would have prevented the court from holding that the charter restrictions required do in fact exist in the charter of the Andrews Institute.

This last-named step has to be taken; nor is it a valid objection that it follows other steps. It will be seen that these successive steps are logically connected one with the other; and that it is of no consequence that the particular step as to which our appeal to the Federal Constitution lies is not the first in the series, so long as it clearly appears to be one that the court must have taken before it could have decided as it has.

We relied at the trial upon the prohibitory language of the Ohio Constitution. That language, the New York

State court was bound to heed, provided it was relevant and decisive of the case. It was relevant, becauses it announces a principle applicable to all statutes of Ohio purporting to grant corporate powers. The statute of 1902, in its terms, confers "general powers" on bodies incorporated under it. If the copying of the will into the articles of a corporation directed by that will to be formed, has the result to embody all the restrictions and limitations of such will into the charter of the corporation, so as to make operative and bindiug upon the incorporators, all the several limitations and restrictions which the testator has enumerated as desired by him to form the character of that particular corporation, it necessarily follows that the corporation so formed has thereby received specially conferred powers. It is not a corporation with general powers, like all other corporations erected under the general law, but a corporation specially fashioned to suit the wishes of a testator. Hence, we conclude that such an effect cannot legally result from the mere copying of a will into the articles, for if it could, this would be to violate the inhibition of the Constitution. The State court, therefore, in deciding that a specially created Ohio corporation can take this residue, has done so in the teeth of the Ohio Constitution—has done so only by refusing to the Ohio Constitution the faith and credit it deserves in the courts of the State of New York.

There are, perhaps, few Federal questions better deserving of a liberal construction at the hands of the court than that which concerns the faith and credit to be given in one State to the records of a sister State. Here a State court has paid no attention whatever to a claim by one of the parties that the Constitution of a sister State should govern the action of the court. As a result, the decision of the State court hands over a large sum of money to a corporation having a board of directors (nearly every one a public official, with a short term of office), and at the same

time closes its eyes to the circumstance that this corporation takes the same unchecked by the restraints that the testator has enjoined shall exist in the charter. The view of the New York court that the words of the will copied into the articles will exercise a restraining influence is obviously unsound since, as we have seen, to impart to them such force is to run counter to the organic law of the State of Ohio.

We made our objection seasonably that the Andrews Institute did not contain in its charter the restrictions that the testator said the corporation should come under. The court meets our objection by saying that the corporation does have the restrictions in its charter, or such is the effect, the court says, of copying into the aricles of incorporation *in extenso* the will of Mr. Andrews We looked ahead, and took the precaution at bar to meet any such contention on the part of our opponents, by shoving to the court that the Ohio Constitution forbids the creation in Ohio of corporations with special charters. In deciding as it has the New York court has paid no attention to the plain words of the Ohio Constitution.

We have been deprived of a right which we set up at the trial, the right to rely upon the inhibtion of the Ohio Constitution, an inhibition that makes it impossible to say that the Andrews Institute possesses charter restrictions such as Mr. Andrews required.

We submit that the gift has gone, by this decision of the New York court, in a direction that the testator did not mean that it should go; that it is sent there by a decision which pays no attention whatever to the imperative language of the Constitution of the State of Ohio.

We made our objection in due season. The decision of the case turns on this point. We set up a right under the Constitution of the United States—a right to have the language of the Ohio Constitution applied to render null

the attempt to clothe the Andrews Institute with special (and not general) powers. This right has been denied us, and we confidently claim that we are entitled to a writ of error.

FRANK W. HACKETT,
EDMUND WETMORE,
For the SMITHSONIAN INSTITUTION.

October, 1908.

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DEC 23 1908
JAMES H. McKENNEY,
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United States Supreme Court,

OCTOBER TERM, 1908,

No. 613.

SMITHSONIAN INSTITUTION AND MELVILLE W. FULLER, AS CHANCELLOR OF SAID SMITHSONIAN INSTITUTION,
Plaintiffs-in-Error,

against

GAMALIEL C. ST. JOHN, AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WALLACE C. ANDREWS, DECEASED, *et al.*

BRIEF OF ATTORNEY-GENERAL OF THE STATE OF NEW YORK IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

In Error to the Supreme Court of the State of New York.

NEW YORK:
MARTIN B. BROWN COMPANY, PRINTERS AND STATIONERS,
Nos. 49 to 57 PARK PLACE.
1908.

Supreme Court of the United States.

SMITHSONIAN INSTITUTION and MELVILLE W. FULLER, as Chancellor of said Smithsonian Institution,
Plaintiffs-in-Error,
vs.
GAMALIEL C. ST. JOHN, as Executor and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, *et al.*

Brief of the Attorney General of the State of New York, on motion to dismiss or affirm.

Statement.

The action below was commenced in the Supreme Court of the State of New York by defendant in Error St. John, as Executor and Trustee under the last Will and Testament of Wallace C. Andrews, deceased, for the construction of said Will and the determination of the rights of the parties thereunto, against The Andrews Institute for Girls; the Smithsonian Institution and Melville W. Fuller, as Chancellor of the Smithsonian Institution; the Attorney General of the State of New York; the heirs at law and next-of-kin and others having possible interest under the Will of the deceased.

The Attorney General was made a party under chapter 701 of the Laws of 1893 of the State of New York. Section 1 of that Act describes certain gifts, grants, bequests and devises for charitable and other purposes, and section 2 provides:

> "Section 2: The Supreme Court shall have control over gifts, grants, bequests, and devises in all cases provided for by section 1 of this Act. The Attorney General shall represent the beneficiaries in such cases and it shall be his duty to inforce such trusts by proper proceedings in the courts."

The amended and supplemental complaint was verified April 20, 1904 (Rec., p. 2). The amended answer of the defendants, Smithsonian Institution and Melville W. Fuller, as Chancellor thereof, was verified June 12, 1905 (Rec., p. 13); and the amended answer of The Andrews Institute for Girls was verified June 17, 1905 (Rec., p. 16).

The action was tried before Mr. Justice Victor J. Dowling, without a jury, and upon his decision judgment was entered on the 25th day of January, 1906 (Rec., pp. 20, 21), adjudging among other things, that The Andrews Institute for Girls was entitled to the residuary estate of said Wallace C. Andrews, deceased, together with the income thereof which had accrued since the death of said deceased, after paying the expenses of administration. That the heirs and next-of-kin had no interest in the estate of said deceased; and,

That the Smithsonian Institution had no interest in said estate.

The Smithsonian Institution and others appealed from that judgment to the Appellate Division of the Supreme Court, First Judicial Department, which unanimously affirmed said judgment April 10, 1907 (Rec., p. 36).

The Smithsonian Institution and others appealed to the Court of Appeals of the State of New York and that

Court modified the judgment of the Court below, by providing that the next-of-kin who appealed were entitled to their respective shares of the income which accrued upon the estate of said deceased from the date of his death to the date of the incorporation of The Andrews Institute for Girls, but, in all other respects, affirmed the judgments below. Judgment upon said remittitur was duly entered in the Supreme Court on the 26th day of June, 1908 (Rec., pp. 44, 45).

Thereafter, the plaintiffs-in-error sued out a writ of error to this Court, and assigned the following errors (Rec., p. 62):

> 1st. "That, after holding that by virtue of the act of the General Assembly of Ohio of March, 1902, the will of Mr. Andrews had been constituted a part of the articles of incorporation of The Andrews Institute, incorporated under that act, so as to make the limitations and restrictions of said will effective as charter provisions, the Court did not apply to the said act of 1902 the inhibition of section 1, article 13, of the Constitution of Ohio, forbidding the General Assembly to pass any special act conferring corporate powers."
>
> 2nd. "That the Court in contravention of section 1 of article 4 of the Constitution of the United States, failed to give full faith and credit to section 1, article 13, of the Constitution of Ohio, forbidding the General Assembly to pass any special act conferring corporate powers, though asked to do so in the event it should hold that the limitations and restrictions of Mr. Andrews' will became effective by being made a part of the articles of incorporation, which holding it did make."

The case in the State courts is reported in 117 App. Div., 698; 191 N. Y., 254.

This motion is made by all the defendants in error to dismiss the writ of error or affirm the judgment of the State Court upon the following grounds:

(*a*) That it appears from said Agreed Record that no Federal question nor any title, right, privilege or immunity claimed under the Constitution of the United States was involved in the proceedings in the courts of the State of New York, nor presented to or decided by said courts.

(*b*) That it appears from said Agreed Record that no Federal question was suggested, nor was any title, right, privilege or immunity claimed under the Constitution or any law of the United States specially set up or claimed in the pleadings or record in said cause, prior to the final determination thereof by the Court of Appeals of the State of New York, but that such purported claims were first suggested, set up and claimed in a motion for re-argument filed by these plaintiffs-in-error in said Court of Appeals, after its decision in said cause had been handed down, which motion was denied by said Court on the ground, among others, that no Federal question had been raised in that Court.

(*c*) That if this Court technically has jurisdiction herein, the Federal question is so obviously frivolous, and the writ of error was so manifestly obtained for delay, that the judgment ought to be affirmed at once, so that the large sum of money intended for benevolent purposes under the Will in question, which has already been tied up nearly ten years, may be utilized instead of remaining unavailable until this cause can be reached in its regular order on the docket of this Court. (Folios 8, 10, 11 papers on motion to dismiss or affirm.)

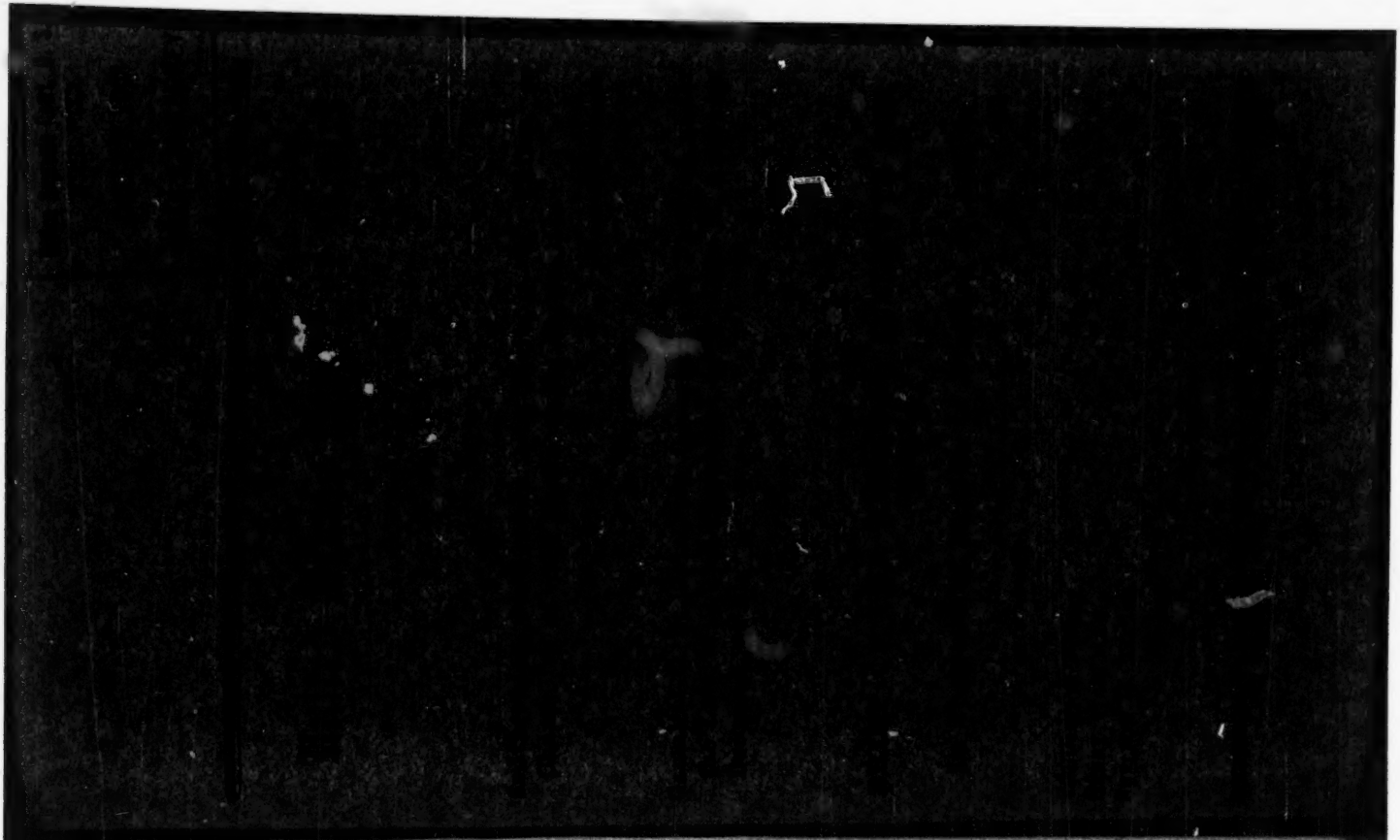
POINTS.

I have examined with great care the Record, the motion for dismissal of the writ of error or affirmance of the judgment and the Briefs of Counsel for the defendants in error St. John and The Andrews Institute for Girls. I believe that the grounds for dismissal or affirmance are fully, adequately and plainly set forth and that without undue repetition I cannot add to the arguments therein set forth. Therefore, I desire to join in the Briefs of counsel for the said defendants in error and upon them to ask the Court either to dismiss the writ of error or to affirm the judgment of the Court below.

Dated New York, December 18, 1908.

WILLIAM S. JACKSON,
Attorney General of the
State of New York.

C. A. DOLSON, Esq.,
Of Counsel.



Supreme Court of the United States.

SMITHSONIAN INSTITUTION and MELVILLE W. FULLER, as Chancellor of said Smithsonian Institution,

Plaintiffs-in-Error,

vs.

GAMALIEL C. ST. JOHN, as Executor and Trustee under the Last Will and Testament of Wallace C. Andrews, Deceased, The Andrews Institute for Girls, et al.,

Defendants-in-Error.

BRIEF OF THE ANDREWS INSTITUTE FOR GIRLS ON MOTION TO DISMISS OR AFFIRM.

Statement.

Wallace C. Andrews, a native of Ohio, but a resident of New York, died in April, 1899, leaving a will (R., pp. 5-8) in which Gamaliel C. St. John was executor. After certain large bequests to relatives, all of which have been paid, he gave

the residue of his estate amounting to more than One million and three hundred thousand dollars (R. p., 37), to a corporation which he directed his executors to cause to be formed under the Laws of Ohio, for the purpose of building and maintaining an industrial school for girls in the town of Willoughby, Lake County, Ohio.

The will among other things, provided (R., p. 7):

> "The charter of the said corporation shall also provide, if and so far as may be consistent with law and practicable, for the management of the said corporation by a board of five directors, to consist of the Governor for the time being of the State of Ohio, the Member of Congress for the time being for the Congressional District embracing the said Town of Willoughby, the Treasurer for the time being of said County of Lake, the Mayor for the time being of Willoughby, and the said Gamaliel C. St. John, and for the choice of a resident of Willoughby by the said Governor as successor to the said St. John as often as the fifth place shall become or be vacant."

In the Eighth clause the will provided (R. p. 7):

> "In case my intention with respect to the said institution for girls shall because of illegality fail, or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution at Washington, District of Columbia, to be devoted to the purposes for which it was established."

In May, 1902, Mr. St. John, the executor, caused to be incorporated under the Laws of Ohio, the defendant-in-error, The Andrews In-

stitute for Girls, in accordance with the directions of the will. A copy of the Articles of Incorporation appears on pages 11 and 12 of the printed record.

After the organization of The Andrews Institute, Mr. St. John, as executor and trustee of the will, brought an action in the Supreme Court of the State of New York against The Andrews Institute for Girls, The Smithsonian Institution and the next of kin, in which he sought a construction of the will and a determination by the Court of the rights of the respective parties. The Smithsonian Institution and Melville W. Fuller, its chancellor, in their amended answer, claiming the residuary estate, alleged, among other things (R. p., 13):

> "Second: Admit that the Andrews Institute for Girls, defendant, was attempted to be organized under an act of the General Assembly of the State of Ohio, entitled 'an Act to provide for the administration of charitable trusts in certain cases,' a copy of which said act is annexed to and made part of the complaint herein, and which was passed by said General Assembly of the State of Ohio, and became a law of said State on or about the 19th day of March, 1902. But this defendant alleges that the said Institute had no existence at the death of the testator, Wallace C. Andrews, or at the death of the said testator's wife, but was attempted to be organized as aforesaid about three years after their respective deaths. This defendant further alleges that said act of the General Assembly of the State of Ohio, was and is unconstitutional and void in that it was and is contrary to Section 1 of Article 13 of the Constitution of the State of Ohio, which provides that 'The General Assembly shall pass no

special act conferring corporate powers;' as by said constitution or a duly certified copy thereof in Court to be produced, will more fully and at large appear; and the alleged organization of said Institute under and pursuant to the terms of said Act was without authority of law, and in all respects void and without effect, and that by reason thereof said Andrews Institute for Girls was not and never has been duly incorporated pursuant to the laws of the State of Ohio or otherwise;
* * * ."

The Andrew Institute for Girls filed its answer (R., p. 16-19), averring that it was duly and legally incorporated under the Laws of Ohio, having a valid and legal existence thereunder (R., p. 17), and that it was the corporation created under the terms of the will and was therefore entitled to the residuary estate (R. P., 18). Issues were joined as to these and other contentions made by the Smithsonian and the next of kin. The Supreme Court of New York, The Appellate Division of the Supreme Court and the Court of Appeals all decided in effect that the testator's "intention with reference to the said institution for girls" was legal; or in other words, that the testator's "intention with respect to the said institution for girls" did not, "because of illegality, fail," and that The Andrews Institute for Girls was legally incorporated in pursuance to the provisions of the Will, and was entitled to the residuary estate.

The Smithsonian Institution obtained a writ of error in this case on the following grounds (R., p. 62):

"I.

Error in that, after holding that by virtue of the Act of the General Assembly of Ohio, of March, 1902, the will of Mr. Andrews had been constituted a part of the articles of incorporation of The Andrews Institute, incorporated under that Act, so as to make the limitations and restrictions of said will effective as charter provisions, the Court did not apply to the said Act of 1902 the inhibition of section one, article thirteen of the Constitution of Ohio, forbidding the General Assembly to pass any special act conferring corporate powers.

II.

Error in that the Court, in contravention of Section I of Article IV of the Constitution of the United States, failed to give full faith and credit to section one, article thirteen of the Consitution of Ohio, forbidding the General Assembly to pass any special act conferring corporate powers, though asked so to do in the event it should hold that the limitations and restrictions of Mr. Andrews' will became effective by being made a part of the articles of incorporation, which holding it did make."

The Articles of Incorporation of The Andrews Institute (R., pp. 11, 12) were of the form prescribed by the general Corporation Laws of the State of Ohio, and there was nothing in them to indicate under what Statute or Sections of the Statutes of Ohio they were filed. The Andrews Institute nowhere alleged that it was incorporated under the Act of 1902 referred to in the Smithsonian's answer. It moreover claimed

and proved that there were other general Laws of Ohio, to which we will refer in detail hereinafter, not attacked by the Smithsonian, under which its incorporation could be sustained. The courts of New York so decided.

The Andrews Institute further contended that if it were held to be incorporated under the Act of 1902, and no other, that that Act was in strict accordance with the Constitution of Ohio; that it was a general Act of uniform operation and not a special Act conferring corporate powers, and therefore perfectly valid under the Ohio Constitution. That position was sustained by the New York courts, and particularly by the Court of Appeals. They recognized the full binding force of the provisions of the Constitution of Ohio relied on by the Smithsonian, and, construing the Act of 1902, held that it was not in contravention thereof.

The Andrews Institute further contended that it was a *de facto* corporation which had not been attacked in the courts of Ohio, and into the legality of whose incorporation the courts of New York could not inquire. The Court of Appeals in effect sustained this contention.

The Andrews Institute further contended that if it were assumed to be a corporation incorporated under the Act of 1902, and that that Act were unconstitutional, these facts would not give the Smithsonian Institution any right in the property left by Mr. Andrews because it had not been shown and could not be shown that no corporation could possibly be formed under the existing laws of the State of Ohio to meet the requirements of the will, or that no constitutional Act could be passed by the Legislature of Ohio in the lifetime of Mr. St. John, the executor,

under which a corporation could be formed to meet those requirements.

No reference to the Constitution of the United States or the Statutes of the United States, or of a Federal question was ever made directly or indirectly—or even remotely, in this case until after the New York Court of Appeals decided in favor of The Andrews Institute, and then only in a motion for a re-argument (R., p. 59). This motion was denied, because as the court (192 N. Y., Advance Sheets July 4, 1908, p. 57) stated "No Federal question having been raised in this Court." (R., p. 60).

The clauses of the Constitution of Ohio referred to in the answer of the Smithsonian Institution (R., p. 13) and its writ of error (R., p. 62) read as follows:

"ARTICLE XIII.

Corporations.

"Section 1. The general assembly shall pass no special act conferring corporate powers.

"Sec. 2. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed" (R., p. 26).

The Act of 1902 under which The Smithsonian claimed that The Andrews Institute was incorporated, and which it claimed was invalid because prohibited by the sections of the Constitution above quoted, reads as follows (R., pp. 9, 10, 11):

AN ACT.

To provide for the administration of charitable trusts in certain cases.

Be in enacted by the General Assembly of the State of Ohio.

Section 1. Whenever, by the last will and testament of any person which has heretofore been, or shall hereafter be, duly admitted to probate in this State or elsewhere, any decedent has devised or bequeathed, or may devise or bequeath, his or her property, or any portion thereof, for charitable uses within this State or for the establishment and maintenance of any industrial or educational school or institution to be located at any place within this State; and whenever, in any such will and testament it has been or may be, provided that the executor or executors thereof shall organize a corporation under the laws of this State for the purpose of receiving the property so devised or bequeathed, and carrying out the charitable purposes in such will expressed, or establishing and maintaining the institution or school therein provided for, and such will further provides for the management of such corporation by a board of trustees or directors, consisting in part, of officials of this State, of the county in which such charities are to be administered or such institution or school located, the officials of any municipal incorporation in said county, and the member of Congress for the district of which said county forms a part, or any of such officials, and names any other person or persons to be associated with said officials or any of them, and provides for the appointment of a successor or successors to the person or persons so appointed to act with

such officials in any manner specified in said will, such executor or executors, or his or their successors in office, and the persons hereinafter named, may constitute themselves a body corporate, with the general powers of benevolent incorporations.

Section 2. Such executor or executors, or his or their successors, shall associate with himself or themselves not more than two citizens and residents other than the persons named in said will, of the county in which such charities are to be administered, or such institution or school located, and he or they and such associates shall execute and acknowledge and file with the Secretary of State of the State of Ohio, articles of incorporation; or, in case he or they do not file such articles within sixty days from and after the passage of this act, or in case of any will which may hereafter be so probated, within six months of such probate, then a majority of the officials for the time being named in any such will or testament may execute, acknowledge and file such articles, which shall in either case set forth:

1. A copy of the will or testament for the carrying out of whose provisions the incorporation is organized.

2. The name of the corporation, which shall include the name of the maker of such will, unless otherwise therein provided, and

3. The location of such corporation.

Section 3. The officers or officials named in such will or testament, together with the persons therein named, and in case the articles are filed by the executor or executors as hereinbefore provided the citizens of said county, not exceeding

two in number, who execute and acknowledge the same with such executor or executors, shall thereupon become the members and directors of such corporation and as the term of any official expires, his successor shall thereupon, by virtue of his office, become one of the members and directors of such corporation, so that the officials named in said will shall, for the time being and from time to time, be directors of said incorporation. Upon the death or resignation of the person or persons named in such will as directors associated with such officials, his or their successor or successors shall from time to time be appointed in the manner provided in such will or testament, if provision therefor be made otherwise by the Board of Directors, and he or they shall thereupon become members and directors of such incorporation. Upon the death or resignation of the two citizens of the county, or either of them, who have become directors by reason of joining in said articles of incorporation, his or their successor or successors shall from time to time be chosen by the Board of Directors, and he or they shall thereupon become members and directors of such incorporation.

Section 4. The Attorney General of the State of Ohio shall in his official capacity, have power to bring proceedings in any court of record to enforce any such devise or bequest, whenever he deems such action necessary for the protection and carrying out of the purposes named in said last will and testament, without waiting for the organization of such corporation.

Section 5. The officers of such corporation shall consist of a president, secretary and treasurer and

such other officers as the Board of Directors may deem necessary. The president shall be a member of the Board of Directors.

Section 6. The Board of Directors may adopt, and from time to time change, such organic rules, regulations and by-laws as they may deem expedient, not inconsistent with the Constitution and Laws of this State.

Section 7. Until the estate shall be finally settled, the Board of Directors may meet in the State of the domicile of the testator.

Section 8. This act shall take effect and be in force from and after its passage.

The Supreme Court (the Trial Court) decided as follows (R., p. 36):

Dowling, J.:

> "As to the validity of the act of the Ohio Legislature under which The Andrews Institute for Girls was formed, it is not the province of the courts of this State to question collaterally the credit to be given to the enactment of another State. If this act is repugnant to the Constitution of the State of Ohio, as claimed, the forum in which to test that question is an Ohio tribunal having authority to construe and determine the force to be given the legislation of its own law-making power."

Upon appeal the Appellate Division of the Supreme Court in affirming the judgment of the Trial Court in favor of The Andrews Institute (*St. John vs. Andrews Institute,* 117 App. Div., 698), said (R., p. 37):

Laughlin, J.:

(P. 702): "The executor, in fulfillment of the directions of the testator contained in the will, procured the incorporation of The Andrews Institute for Girls under the laws of Ohio on the 13th day of May, 1902, and the corporation organized and accepted the gift on the 29th of the same month. * * *"

(P. 715) (R., pp. 41, 42): "The learned counsel for the Smithsonian Institution also contends that the Andrews Institute for Girls was not legally incorporated and, therefore, cannot take the bequest. It is not claimed that the regularity of the incorporation or organization can be questioned collaterally, as clearly it cannot; but it is insisted that the corporation may be shown to have no legal existence because incorporated in violation of the constitution of that state. Owing to the provisions with respect to the management of the corporation by a board of five trustees, four of whom were to be officials, it was deemed advisable to apply to the Legislature for the enactment of a general law under which the corporation could be formed. The Act was passed on the 19th day of March, 1902. It contains no specific reference to this will or to the bequest to the Ohio corporation to be formed. The title of the Act 'An Act to provide for the administration of charitable trusts in certain cases,' is general, and the Act is general in terms and relates to devises and bequests for charitable uses, 'or for the establishment and maintenance of any industrial or educational school or institution to be located at any place within this State,' theretofore or thereafter made, and provides for the formation of a corporation by the executor and officials designated in the will, referring to wills providing for the management of the corporation by a board of trustees or directors consisting in part of officials of the state and of the county, municipal cor-

poration, and member of Congress for the District in which the charity is to be administered, or institution or school is to be located. The Andrews Institution was thereafter incorporated by filing a certificate of incorporation which does not specify and was not required to specify the particular statute or statutes under which it was filed. Many general statutes of the state are cited from which it is claimed authority for the incorporation exists, with the possible exception of the management of the corporation by such officials, and this statute of March 19th is relied upon as authority for the corporation in that regard. The contention is that the statute is in contravention of Section 1 of Article 13 of the Constitution of Ohio, which provides that 'the general assembly shall pass no special act conferring corporate powers.' It is quite likely that the corporation could be sustained under other statutes, even if the provisions of the Act of March 19, 1902, with respect to the composition of the board of trustees should be declared invalid (see Bates An. Ohio Stat., Secs. 3235, 3236, 3238, 3726, 3727, 3734; id., Secs. 4015-67 et seq., p. 2279, Sec. 1 et seq.; 53 O. L., 33, Sec. 1 et seq.). These statutes among other things authorize the formation of a corporation for any purpose for which individuals may lawfully join except for carrying on professional business, and provide for filling vacancies in the board of trustees from any cause, and for the management of schools or academies receiving bequests and devises by the Court of Common Pleas where the management is not otherwise provided for and for the execution of the trusts upon which the property was bequeathed or devised. Nor does the argument that this is a special act in violation of the Constitution seem tenable (*State ex rel. vs. Spellmire*, 67 Ohio St., 86). It is exceedingly doubtful whether, in any event,

we would be justified in refusing to allow the Andrews Institute to take this bequest upon the theory that it has no corporate existence, when, so far as appears, it is recognized by the state and no proceeding has been taken to have its charter either anulled or forfeited. (*State vs. Gardiner,* 54 Ohio St., 24; *Bartholomew vs. Bentley,* 1 id., 37; *Trustees of Vernon Society vs. Hills,* 6 Cow., 23; *Lamming vs. Galusha,* 81 Hun, 247; Cooley Const., Lim., 5th ed., 311; Cook Corp., 5th ed., Sec. 637; Thomp. Corp., Sec. 501; *Coast Co. vs. Spring Lake,* 56 N. J. Eq., 615; *Merrick vs. Van Santvoord,* 34 N. Y., 208; *United States Vinegar Co. vs. Schlegel,* 143 id., 537.) Under the authority to determine whether the legatee is competent to take the legacy, we, of course, are authorized to determine the extent of the corporate authority, but the corporate existence is quite another thing. While I think the Andrews Institute was legally incorporated, it is at least a de facto corporation acting under color of law, and apparently recognized by the state, under whose laws it has sprung into existence, and with little likelihood of its corporate existence being drawn in question."

The New York Court of Appeals on appeal made a slight modification in the judgment of the lower court, giving a part of the income for the period intervening between the death of the testator and the incorporation of the Andrews Institute to some of the next of kin, but affirmed the holdings of the lower courts that The Andrews Institute for Girls and not The Smithsonian Institution, was entitled to the residuary estate. The Court of Appeals (*St. Johns vs. Andrews Institute,* 191 N. Y., 254), unanimously speaking through Chase, J., said (R., pp. 50, 51):

"* * * The testator's direction to the executor and executrix and the survivor

of them, was to procure an incorporation to be formed under the laws of the State of Ohio, without specifying any particular method of procuring such incorporation. He did not direct that it should be chartered by an act of the general assembly of the State of Ohio. Indeed, if he gave the matter any special consideration he must have known that the constitution of the State of Ohio prohibits the passage of special acts conferring corporate powers (Constitution of Ohio, Art. 13, Sec. 1).

"At the death of the testator the general statutes of Ohio provided that corporations might be formed for any purpose for which individuals might lawfully associate themselves, except for carrying on professional business. (Bates Ann. Ohio Statutes (6th ed.), vol. 2, p. 1836.)

"Subsequent to the death of the testator and in March, 1902, an act was passed by the general assembly of the State of Ohio entitled 'An Act to provide for the administration of charitable trusts in certain cases.' If we assume that such act was passed to aid in the incorporation of The Andrews Institute for Girls, it is not necessarily unconstitutional for that reason. It is not an uncommon thing in any state for questions to arise making it desirable or perhaps necessary for further general legislation to enable persons interested to carry out desired and desirable measures. The fact that such further general statute is passed to aid a particular person for the time being does not make the act a special, as distinguished from a general one. Whether an act, general in form, is a mere device to evade a wholesome constitutional provision is largely dependent upon the special circumstances of each case. If the act relates to persons, places and things as a class and is

neither local nor temporary the mere fact that its practical effect is special and private does not necessarily prove that it violates constitutional provisions against special legislation. (*Matter of N. Y. El. R. R. Co.*, 70 N. Y., 327, 344; *In the Matter of Church*, 92 N. Y., 1; *Matter of Henneberger*, 155 N. Y., 420, 426; *People vs. Dunn*, 157 N. Y., 528; *Kittinger vs. Buffalo Traction Co.*, 160 N. Y., 377; *People ex rel. Clausen vs. Newburgh & S. Plank Road Co.*, 86 N. Y., 1; *Matter of N. Y. & L. I. Bridge Co.*, 148 N. Y., 540; *Waterloo W. M. Co. vs. Shanahan*, 128 N. Y., 345; *Ferguson vs. Ross*, 126 N. Y., 459; *Sun P. & Pub. Association vs. Mayor, etc., of N. Y.*, 152 N. Y., 257.)

"The act so passed by the general assembly of the State of Ohio in 1902 would not seem to be a violation of the Constitution of that State. (*Platt vs. Craig*, 66 Ohio St., 75; *State ex rel. vs. Spellmire*, 67 Ohio St. 77; *Gentsch vs. State ex rel. McGorray*, 71 Ohio St., 151; *Cin. Street R. Co. vs. Horstman*, 72 Ohio St., 93; *State ex rel. Atty. Gen. vs. Sherman*, 22 Ohio St., 411.)

"Subsequent to the death of the testator, and on the 8th day of May, 1902 'The Andrews Institute for Girls' was incorporated pursuant to the laws of the State of Ohio 'for the purpose of receiving the property devised and bequeathed in and by the wills of Wallace C. Andrews and Margaret M. St. John Andrews, late of the city and state of New York, to the corporation therein directed to be formed and for the purpose of carrying out the charitable purposes in such wills expressed, and of establishing and maintaining the institution therein provided for.'

"The articles of incorporation include a complete copy of the will of the testator and also of the will and codicil of Margaret M.

St. John Andrews. They also provide that the corporation shall be located in the Town of Willoughby, Ohio, and name as members of the corporation the persons proposed in the will of said testator, together with two other persons in the State of Ohio, which persons so named constitute the board of directors for the administration and management of the property and trust or other funds of the corporation, and for the control and management of said institution. Said act of the general assembly of the State of Ohio among other things provides: 'The attorney-general of the State of Ohio shall in his official capacity have power to bring proceedings in any court of record and enforce any such devise or bequest whenever he deems such action necessary for the protection and carrying out of the purposes named in said last will and testament without waiting for the organization of such corporation.'"

Upon these facts we contend, that the writ of error of the Smithsonian should be dismissed, or the judgment of the New York Court of Appeals affirmed, because,

1st: If there had been a so-called Federal question it was presented too late.

2nd: There is no Federal question involved in the record, inasmuch as it clearly appears that the courts of New York (a) did not refuse to recognize and sustain the validity of the Ohio Act of 1902, but did do so, and (b) did not refuse to recognize the binding force of the Constitution of Ohio, but did do so.

3rd: The validity of the Act of 1902 was not necessarily involved in the judgment of the New

York Courts which rightly held that there was ample authority under other general Laws of Ohio for the organization of the corporation in question.

4th: The Act of 1902 complained of was not a special Act, such as is inhibited by the Ohio Constitution.

5th: If there were any Federal question involved, it is clearly frivolous.

The Smithsonian did not even intimate that it claimed the protection of the Constitution of the United States or that there was any Federal question in the case, until after the highest court of New York had rendered its decision.

The appellate jurisdiction of this Court to review the judgment of The Court of Appeals of New York is invoked by the claim made by plaintiffs-in-error that this case is one of the third class of cases specified in the judiciary act conferring such jurisdiction, to-wit, a case "where is drawn in question the construction of any clause of the Constitution * * * of the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said Constitution * * *."

Obviously the case cannot fall within either of the other classes specified in the judiciary act.

It is claimed that the plaintiffs-in-error had the right, under the full faith and credit clause of the Constitution of the United States, to have

the courts of New York decide that the Ohio Statute criticized was in violation of the Constitution of the State of Ohio, and that those courts decided against that right.

Was such right specially set forth or claimed upon the trial of this cause, within the meaning of the judiciary act?

The Smithsonian's pleadings clearly made no reference to it. It simply averred that the statute in question under which it claimed The Andrews Institute was incorporated, was a special act conferring corporate powers, and therefore in violation of the Constitution of Ohio (R., p. 13). It called upon the court to construe the statute and determine whether it was or was not in violation of that Constitution, but did not suggest to the court that its power of construction was in any wise limited or constrained by any clause of the Constitution of the United States. This is not a sufficient setting up or claim of a right of that character to confer jurisdiction upon this Court.

The subject is discussed at much length in *Mutual Life Insurance Co. vs. McGrew,* 188 U. S., 291. In that case counsel set up a proceeding in the courts of Hawaii and a law of that country as affecting certain rights of the parties. The contentions of the parties setting up that proceeding and law were defeated in the courts of California. The practice of the State of California required all claims to be made in the trial court, and prohibited the making of new claims upon error proceedings in the Supreme Court of the State. Counsel attempted to make a Federal question in the error proceeding, and, after disposing of this effort on the ground that it

came too late, this Court proceeded to consider whether or not the Federal question did appear in the lower courts, and disposed of the contention in the following language:

Fuller, C. J.:

(Pp. 309-310): "Neither the pleading of the decree of divorce nor of the statute of Hawaii providing for the forfeiture of Mrs. McGrew's rights in the policy of insurance, as construed by the Supreme Court of Hawaii, nor of both together, amounted to specially asserting any right under the treaty. Those averments did not assert that claim in the trial court in such manner as to bring it to the attention of that court, nor, indeed, to show that any right under the treaty was present in the mind of counsel.

"To give them that effect would be in the teeth of our decision in *F. G. Oxley Stave Co. vs. Butler County*, and numerous other decisions. That case involved a decree, in respect of which there was a general allegation that it was rendered against dead persons, as well as in the absence of necessary parties who had no notice of the suit; and we held that such general allegations did not meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege, or immunity 'specially set up or claimed' under the Constitution or authority of the United States. Mr. Justice Harlan said: 'This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated * * *.

Upon like grounds, the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.'"

Scudder vs. Coler, 175 U. S., 32.

Gray, J.:

(P. 36): "Both these statements clearly refer to the laws of New York, and not to the Constitution of the United States. And the opinion of the Supreme Court, as well as that of the Court of Appeals, turns upon the question whether the sum due from the Farmers' Loan and Trust Company of the City of New York to the intestate at the time of his death was 'property within the State,' within the meaning of the statute of 1892.

"No mention of the Constitution of the United States, or of any provision thereof, by the plaintiff in error, or by the court, is to be found at any stage of the case while it was pending in the courts of the State of New York; and it is impossible, upon this record, to avoid the conclusion that it never occurred to the plaintiff in error to raise a Federal question until after the case had been finally decided against him in the highest court of the State.

"In order to give this court jurisdiction of a writ of error to review a judgment which the highest court of a State has rendered in favor of the validity of a statute of or an authority exercised under a State, the validity of the statute or authority must have been drawn in question * * * on the ground of their being repugnant to the Constitution, laws or treaties of the United States.' When no such ground has been presented to or considered by the courts of the State, it cannot

be said that those courts have disregarded the Constitution of the United States, and this court has no jurisdiction. Rev. Stat., Sec. 709; *Murdock vs. Memphis,* 20 Wall., 590, 633, 634; *Levy vs. Superior Court of San Francisco,* 167 U. S., 175; *Miller vs. Cornwall Railroad,* 168 U. S., 131; *Columbia Water Power Co. vs. Columbia Railway,* 172 U. S., 475, 488, and cases there cited."

Zadig vs. Baldwin, 166 U. S., 485.

White, J.:

(P. 488): "It is clear, however, that we have no jurisdiction to pass upon the questions presented in these assignments, for the reason that it nowhere appears in the record that the plaintiffs in error at any time questioned the validity, under the Constitution of the United States, of the section of the state constitution relied on to support the claim made against them, or in any manner specially set up or claimed the protection of any clause of the Constitution of the United States.

"The contention that there was a Federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state, in which such a Federal question is discussed, and it is asserted orally at bar that in the oral argument made in the supreme court of California a claim under the Federal Constitution was presented. But, manifestly, the matters referred to form no part of the record and are not adequate to create a Federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state. *Pim vs. St. Louis,* 165 U. S., 273 (ante, 714); *Chicago & N. W.*

R. Co. vs. Chicago, 164 U. S., 454, 457 (ante, 511, 512); *Dibble vs. Bellingham Bay Land Co.,* 163 U. S., 63, 70; *Ansbrough vs. U. S.,* 159 U. S., 695; *Sayward vs. Denny,* 158 U. S., 180;, and cases there cited."

There is an apparent exception in one class of cases within which the plaintiff-in-error is endeavoring to bring this case. That exception is that when one claims a right based on the judgment or decree of the Courts of another state he necessarily claims a right which exists only under the Federal Constitution, for the reason that a judgment of one state has no force or effect in another state, save for the Federal Constitution requirement that judgments and decrees of the courts of one state shall be given full faith and credit in another state. It follows, therefore, that when one sets up such a judgment he necessarily claims a right which exists only under the Federal Constitution, and therefore no further words upon the subject are necessary.

Tilt vs. Kelsey, 207 U. S., 43, is an example of this class of cases. In that case this Court, with respect to a judgment of another state, said:

Moody, J.:

(Pp. 50,51.) "We think, however, that a right under the Constitution of the United States was specially set up and claimed by the executors, as required by Sec. 709 of the Revised Statute (U. S. Comp. Stat., 1901, p. 575), and denied by the highest court of the state, and that therefore we have authority to re-examine the decision. It appears clearly in the paper entitled 'Appeal to the Surrogate' that the executors relied upon the judicial proceed-

> ings in New Jersey as a defense to the assessment of the New York tax. They 'specially set up and claimed' a right under those proceedings, though it was not in terms stated to be a right claimed under the Constitution. This, in the case of a judgment of the court of another state, has been held to be a sufficient compliance with the statute. *Great Western Teleg. Co. vs. Purdy,* 162 U. S., 329; *Bell vs. Bell,* 181 U. S., 175; *Andrews vs. Andrews,* 188 U. S., 15, and see the remark of the Chief Justice in the *Mutual L. Ins. Co. vs. McGrew,* 188 U. S., 291, at page 311.

The case at bar is entirely unlike, and not controlled by cases of the class just quoted. So far as the courts of New York were advised during the hearing, they were simply asked to make a construction of a certain law of the State of Ohio to determine whether or not it was within the terms of the Ohio Constitution. There was no suggestion, nor was the mind of the Court drawn to the Federal Constitution as having any bearing upon the question submitted. It is therefore only by inference that the Federal question could be said in any event to have been involved and inference is clearly insufficient to confer the jurisdiction.

The language of this Court in *Osborne vs. Clark,* 204 U. S., 565, is applicable to the present case.

Holmes, J.:

> (P. 568): "But the plaintiffs in error say further, that the question of their rights under the Constitution of the United States necessarily was involved in a decision upon the bill, and that that is enough when the validity of a state law is concerned." * * * (citation of cases.) * * * "These and similar cases, however, are not to be pressed to the point that, whenever it appears that the

> state law logically might have been assailed as invalid under the Constitution of the United States, upon grounds more or less similar to those actually taken, the question is open. If a case is carried through the state courts upon arguments drawn from the State Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States * * *."

Moreover the attempt to raise a Federal question in this case came too late to give this Court jurisdiction. Nothing was ever said about a Federal question until the attention of the Court of Appeals of New York was first drawn to the so-called Federal question in the motion for reargument filed by plaintiffs in error after the decision had been handed down. The Court did not entertain, but denied the motion because, "No Federal question having been raised in this Court" (R., p. 60).

The Disconto Gesellschaft vs. Umbreit, 208 U. S., 570.

Day, J.:

> (Pp. 577, 578.) "It is well settled in this court that it is too late to raise Federal questions reviewable here by motions for rehearing in the state court. *Pim vs. St. Louis,* 165 U. S., 273; *Fullerton vs. Texas,* 196 U. S., 192; *McMillen vs. Ferrum Min. Co.,* 197 U. S., 343, 347; *French vs. Taylor,* 199 U. S., 274, 278. An exception to this rule is found in cases where the supreme court of the state entertains the motion and expressly passes upon the Federal question. *Mallett vs. North Carolina,* 181 U. S., 589, *Leigh vs. Green,* 193 U. S., 79."

The New York Courts recognized the force of the Ohio Constitution and the validity of the Act of 1902. Legitimate questions of the construction of State Constitutions or Statutes are not Federal questions, such as give this Court jurisdiction to review the judgments of State Courts.

The Courts of New York, as shown in their opinions, intimated that if it were necessary to pass upon the validity of the Statute complained of, they would construe it to be a General Act and not a Special Act conferring corporate powers, and therefore valid under the Constitution of Ohio. The Courts recognized the binding force of that Constitution, but gave it such a construction that the Act of 1902 did not come within its inhibition (R., pp. 42, 50). The Courts not only upheld the validity of the Constitution of Ohio, but also the validity of the Act of 1902 (R., pp. 42, 50). Such a holding might well be said to involve merely the construction of that statute as to whether it was general or special and this Court has repeatedly held that decisions as to the construction of statutes do not present Federal questions reviewable in this Court.

Eastern Bldg. & L. Asso. vs. Williamson,
189 U. S., 122.

Brewer, *J.*,

> (P. 125.) "The Federal question presented arises on the contention that the South Carolina courts did not give 'full faith and credit * * * to the public acts, records and judicial proceedings' of

the State of New York, as required by Sec. 1, Art. 4 of the Constitution of the United States.

"Courts of one state do not take judicial notice of the laws of another state, whether written or unwritten. They must be proved as facts * * *

"The law of New York was so proved in this case, and the contention is that it was not rightly construed by the South Carolina courts; that the law of New York which entered into and formed a part of the contract sued on was not given by those courts the same force and effect that it had in New York, and that hence the rights secured by the Constitution of the United States to the plaintiff-in-error were denied. If it appeared that the South Carolina courts, without questioning the validity, simply construed a statute of New York, no Federal question would be presented. * * * *"

(P. 126.) "All these were received in evidence, and when so received, it became a matter of judicial construction to determine whether they had such effect, and that was a question which, nothing else being shown, was for the consideration of the courts in which the litigation was pending. In like manner, after the decisions of the courts of New York were received in evidence, their meaning and scope became matters for the same consideration. While statutes and decisions of other states are facts to be proved, yet, when proved, their construction and meaning are for the consideration and judgment of the courts in which they have been proved."

Allen vs. Alleghany Company, 196 U. S., 458.

BROWN, *J.*,

(P. 464): "Since the above case we have repeatedly held that the mere construction by a

state court of a statute of another state, without questioning its validity, does not, with possibly some exceptions, deny to it the full faith and credit demanded by the statute in order to give this court jurisdiction. *Glenn vs. Garth*, 147 U. S., 360; *Lloyd vs. Matthews*, 155 U. S., 222; *Banholzer vs. New York L. Ins. Co.*, 178 U. S., 402; *Johnson vs. New York L. Ins. Co.*, 187 U. S., 491; *Finney vs. Guy*, 189 U. S., 335."

Johnson vs. New York Life Insurance Co., 187 U. S., 491.

Brown, J.:

(P. 495): "The supreme court of Iowa did not fail to give due faith and credit to the notice law of New York, since it was fully considered, and the decision of the state courts of New York were called to its attention and cited in its opinion. The court held that notice is required by that statute only as a basis for declaring a forfeiture or lapse of a policy for nonpayment of premium or interest, and that the law had no application, because it was a nonforfeitable policy of term insurance, which had expired by limitation before the insured died. Whether the supreme court of Iowa was correct in its construction of the applicability of the New York notice statute to this policy was immaterial, since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case. The case is covered by that of *Banholzer vs. N. Y. Life Ins. Co.*, 178 U. S., 402, and in principle by *Glenn vs. Garth*, 147 U. S., 360; *Lloyd vs. Matthews*, 155 U. S., 222. To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment.

The writ of error is dismissed."

The Courts of New York correctly held that it was not necessary, in order to render judgment in favor of The Andrews Institute, to pass on the validity of the Ohio Act of 1902. Its incorporation was sustainable under other general statutes of Ohio. There is, therefore, no Federal question in this case.

It is not enough to confer jurisdiction upon this Court that there was involved a right claimed under the Constitution of the United States, and that the court decided adversely to that right, provided there were other and distinct grounds upon which the judgment of the State Court might fairly be based.

The record makes no such showing in the present case. The New York courts did not determine that The Andrews Institute was incorporated under the particular Act complained of. There were other general statutes of ample breadth to permit the organization of that Institution in precisely the manner in which it was organized, and it was therefore not essential to the final judgment of the court to determine whether the Act complained of violated the Constitution of Ohio.

De Saussure vs. Gaillard, 127 U. S., 216.

Matthews, *J.*,

> (P. 234.) And it has been repeatedly decided, under section 709 of the Revised Statute, that, to give this Court jurisdiction of a writ of error to a state court, it must appear affirmatively not only that a federal question was presented for decision to the highest court of the State, having jurisdiction, but that its de-

cision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *Brown vs. Atwell,* 92 U. S., 327; *Citizens' Bank vs Board of Liquidation,* 98 U. S., 140; *Chouteau vs. Gibson,* 111 U. S., 200; *Adams County vs. Burlington & M. R. R. Co.,* 112 U. S., 123; *Detroit City R. Co. vs. Guthard,* 114 U. S., 133; *New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.,* 125 U. S., 18."

Leathe vs. Thomas, 207 U. S., 93.

Holmes, J.:

(P. 98.) "It is admitted that the general and well settled rule is that in a case coming from a state court this Court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions. *Murdock vs. Memphis,* 20 Wall., 590; *Sauer vs. New York,* 206 U. S., 536, 546. It is admitted further, that a decision upon those questions must have been necessary to the decision of the case, so that, if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed, as the case may be. *Murdock vs. Memphis, supra.* But *Murdock vs. Memphis* does not stop there. It further establishes that when the record discloses such other and completely adequate grounds this court commonly does not inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result. 20 Wall., 590, 635; *Eustis vs. Bolles,* 150 U. S., 361, 369; *Castillo vs. McConnico,* 168 U. S., 674, 679."

Stickney vs. Kelsey, Comptroller, 209 U. S., 419.

Moody, *J.*,

(P. 422.) "But we think, in view of the fact that when the copies of the journals were offered in evidence no objection had been made that the originals were not produced, the language of the court may quite as naturally be interpreted as a declination to pass on a question, not necessary to the decision, which had been set at rest for the future by legislation. The best that can be said for the plaintiffs-in-error is that the action of the court was ambiguous. We resolve the ambiguity against the parties complaining, who are bound to show clearly that a Federal right was impaired, rather than misuse our ingenuity to spell out a Federal question to aid a defense which is merely technical and destitute of substantial merit."

The Ohio statutes provide that a corporation may be formed for any purpose whatsoever, except for carrying on professional business.

Section 3235, Vol. 2, Bates' Annotated Ohio Statutes, 6th Ed., p. 1836, reads:

"Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves, except for carrying on professional business."

Vol. 2, Bates' Annotated Ohio Statutes, 6th Ed., Sec. 3236, p. 1838, provides:

"Sec. 3236. (*Articles of incorporation; what to contain.*) Any number of persons not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge, * * * articles of incorporation, the

form of which shall be prescribed by the Secretary of State, which must contain:

"1. The name of the corporation, which shall begin with the word 'The' and end with the word 'Company', unless the organization is not for profit.

"2. The place where it is to be located, or where its principal business is to be transacted.

"3. The purpose for which it is formed.

"4. The amount of its capital stock, if it it to have capital stock, and the number of shares into which the stock is divided.

"5. Provided, any association of five or more persons, who are residents of the State of Ohio and who are associated, not for profit, * * * may be incorporated, having its location or principal place of business in the State of Ohio, and without naming, in its articles of incorporation, a permanent place where it is to be located, or where its principal business is to be transacted. * * * ."

Sec. 3238. (p. 1839.) (*Articles must be acknowledged, certified and filed with Secretary of State).* The official character of the officer before whom the acknowledgment of articles of incorporation is made shall be certified * * * * and the articles shall be held in the office of the Secretary of State, who shall record the same, and a copy duly certified by him shall be *prima facie* evidence of the existence of such corporation. * * *"

Let us examine the Will, to see what the provisions are with reference to the incorporation.

The Will provides:

(R., pp. 6, 7.) "Fifth, I direct my executor and executrix * * * to procure under the laws of the State of Ohio, an incorporation to be formed with the proper powers for the

purpose of establishing an institution * * * for the free education of girls and for their support in proper cases during education, with a special view toward rendering them self-supporting. * * *

The charter of the said corporation shall also provide, *if and so far as may be consistent with law and practicable,* for the management of the said corporation by a board of five directors, to consist of the Governor for the time being of the State of Ohio," etc., etc.

The make-up of the board is not in the remotest degree made a condition upon which the formation of the corporation is to depend. If such a board as he prefers, can be had *consistently* with the laws of Ohio, he would like it. If it cannot be had *consistently* with the laws of Ohio, *or if it is not practicable,* then the corporation is to be formed and operated without such board. In no way is the existence of such a board for the management of the institution made a *sine qua non.*

Now, assume for the purpose of this argument, that the clause of the Charter of The Andrews Institute which provides who the directors shall be, is void, as being in contravention of some statute or the Constitution of Ohio, or because there is no authority, under the laws of Ohio, to put it in the charter, still, the charter would stand; that clause would be disregarded as surplusage, and the corporation having been formed under the law of Ohio just quoted, which provides *that corporations may be formed for any purpose,* would be valid, and Mr. Andrews' Will would be fully carried out, for he did not, as already stated, make his desire that gentlemen occupying certain offices should be the directors, a condition precedent to the formation of the corporation.

(Sec. 3733 (p. 2061) Bates' Annotated Ohio Statutes. "(*How vacancies in boards filled in certain cases.*) Whenever there occurs a vacancy, in whole or in part, in the board of trustees of an incorporated college, seminary, or academy, by reason of an amendment of the charter in such corporation, or from any other cause, and there is no provision of law for filling such vacancy, the Governor shall, within three months after receiving information thereof, appoint the required number of trustees, one-third thereof to serve for one year, one-third to serve for two years, and one-third for three years (75 v. 25, Sec. 2)."

Sections 4105-67, Sec. 1, page 2279, Bates' Ann Ohio Statutes, 53 O. L., p. 533:

"Whenever any person shall, by deed, devise, gift or otherwise, set apart any lands, moneys or effects, as an endowment of a school or academy, not previously established, *and shall not provide for the management of such school or academy,* the Court of Common Pleas of the proper county shall appoint five trustees," * * * who "shall be a body corporate with perpetual succession," &c.

Under this section a corporation might have been created, and the appointment of trustees of the corporation vested in the Court of Common Pleas. This statute plainly shows that the testator may name the trustees to manage the Corporation, because it says, "If he shall not provide in his will for the management of such school or academy, then the Court of Common Pleas shall appoint five trustees."

Sec. 3727, Bates' Annotated Statutes of Ohio (p. 2061). "(*May hold donated property in trust.*) Any university, college, or academy, or the trustees thereof, may hold

in trust any property devised, bequeathed or donated, to such institution, upon any specific trust consistent with the objects of the corporation (50 v. 128, Sec. 5; S & C., 267)."

Section 3726, p. 2060, Bates' Annotated Statutes of Ohio, 6th Ed., provides that:

"The trustees of a college, * * * or other institution of learning incorporated for the purpose of promoting education, religion, * * * * which has acquired real or personal property of the value of five thousand dollars, * * * may appoint a president, professors and tutors, and any other necessary agents and officers, * * * and may enact such by-laws, * * * for the government of the institution, and for conducting the affairs of the corporation, as they may deem necessary * * *."

Section 3734 (p. 2062), Bates' Annotated Statutes of Ohio, provides that:

"A college * * * or other institution devoted to the promotion of education, now existing by virtue of any special act of incorporation, or organized under the provisions of any law, whose property is derived and held by donation, gift, purchase, devise, or gratuitous subscription, and the amount of which, or the income arising therefrom, is limited by such special act, or by the articles of association adopted by such institution, may receive, acquire * * * hold hereafter any amount of property * * * which its board of * * * trustees shall deem it advisable for the institution to accept, and may * * * sell * * * *and convey the same, but such property shall not be diverted from the express will of the donor, devisor or subscriber.* The board of trustees * * * in anticipation of donations to be received and collections to be made may * * * borrow such sums of money as they may determine

necessary, * * * and may issue bonds therefor and secure the same by a mortgage upon the property upon which such improvement is to be made, provided such property is not held by them under some specific trust."

If there can be discovered in this record a Federal question, it is clearly frivolous and the judgment should be affirmed.

The Law of 1902 requires a corporation organized under its provisions to make part of its articles of incorporation, the will to carry out whose provisions the corporation is being organized.

The contention of the plaintiffs in error is that this requirement of the law, if thereby the provisions of the will become a part of the corporate charter, converts the statute into a special act conferring corporate powers, because each will, to carry out the provisions of which a corporation is organized, will be different in terms. Such a claim is clearly frivolous. It might as well be said that because the other Laws of Ohio require the articles of incorporation of each corporation organized thereunder to specifically set forth the particular purpose for which it is organized, the setting forth of such purpose converts legislation from general to special legislation, because of the fact that under its provisions one corporation may be authorized in its charter to carry on a hardware business and another corporation be authorized in its charter to operate a coal mine.

The Ohio Act of 1902 is valid under the Constitution of Ohio.

This Act under which the Smithsonian claims that The Andrews Institute was incorporated is a general Act conferring corporate powers and is not a special Act.

Charitable bequests take many forms. They are dependent upon the will, the wish and sometimes the caprice of the testator. The law of 1902 applies to any Will theretofore or thereafter made, in which the testator desires any State official, or any official of the county, or municipality, or the Member of Congress of the district in which the charitable or educational institution is to be located, to act as a member of the Board of Trustees. It is not confined to the Govenor or County Treasurer or Mayor, but is applicable where any other official of the State, county or municipality or the Member of Congress was or is desired by any testator (who made his Will before its passage, or shall make his Will thereafter) to act as a director of the charitable corporation which the testator desires to be incorporated. It is a wise provision, general in its nature and applies to Wills made before the Andrews' Will was made, and to many which will be made in the future by testators who desire their public charities administered by the very men whom the people have entrusted with their interests and affairs.

The subject matter of the Act of 1902 is to provide for the management of schools where property or money has been set apart by will for the endowment of such school, and where the testator

desires to provide that public officials shall have a part in the management thereof.

It was within the province of the general assembly to pass a general law covering such subject-matter available for all time to all testators who desire or will desire their charitable corporations, anywhere and everywhere in Ohio, so officered. Appying the test of constitutionality laid down by the Supreme Court of Ohio in *Platt vs. Craig,* 66 Ohio St., 75, *post,* it is not "local and temporary in its operation," and therefore it is constitutional.

The Subject matter of the law is of a general nature and capable of being covered by general law.

The Ohio Legislature determined in 1856 that the gift or devise of property by way of endowment for the establishment of schools and academies where no provision is made for the government of such school or academy by the deed or devise of gift, was a subject matter capable of being covered by general law, and made provision in Section 4105-67, *et seq.* (supra), for such situation, 53 O. L., page 533. The first section of that act provides that where any persons shall by deed, devise, gift or otherwise set apart any lands, moneys or effects as an endowment for a school or academy not previously established, and shall not provide for the management of such school or academy, the Court of Common Pleas shall appoint five trustees to have control and management of the property and the school, and also provides that such trustees shall be a body corporate with perpetual succession. The Act, by the last section, provides that it should

apply *to endowments theretofore created as well as to funds thereafter created.* Obviously this law, which has stood unchallenged upon the statutes of the State for nearly fifty years, was passed to meet an exigency or situation which had then but recently arisen.

The only difference between that Act and the Act of 1902 is that in the latter Act it is provided that the testator making such endowment may provide that the trustees having control and management of the property and school, may in part be composed of officials of the State, while the Act of 1856 implies the right of a testator to nominate the persons who should constitute the Board of Trustees and provides against the failure of the testator to make such provision.

The right of a testator to establish schools and to appoint trustees therefor, is, of course, without question. It follows that the Legislature may provide for the creation of said trustees into a body corporate where such statute is one having universal operation throughout the State, and universal application to all persons who have come or shall come within its provisions.

There is nothing which prohibits the officers of the State of Ohio from becoming trustees of such an institution as is covered by these statutes.

Under Section 3133 supra, the Governor fills vacancies in the boards of trustees of "incorporated college, seminary or academy."

Under Sections 4105-17 and 4105-55 supra, provision is made for the appointment of trustees for educational institutions by the Governor of the State with the advice and consent of the Senate, and under Section 4098 (p. 2262), direct provision is made for the appointment of a board

of trustees and as to their power and authority, and requiring that the Mayor of the municipality shall be a member of such board.

The Act of 1902 does not establish an artificial, fictitious or unreasonable classification; nor is it a Special Act.

The Supreme Court of Ohio, in *Platt vs. Craig, et al.*, 66 Ohio State, 75, has defined what a Special Act is:

Davis, *J.*,

> (p. 77.) "The Constitution must be construed in the light of the popular and received signification of its words. Because it emanates from the people it must be construed as the people must have understood it. The terms 'general' and 'special' must therefore be understood and applied in their ordinary and non-technical sense. They are antonyms. 'General' is defined in Webster's International Dictionary as follows: '4. Common to many or the greatest number, widely spread; prevalent, extensive though not universal.' The same eminent authority defines 'special' thus: '2 Particular; peculiar; different from others; * * * 3. * * * Designed for a particular purpose, occasion or person. 4. Limited in range; confined to a definite field of action. * * * ' It would seem to be clear, therefore, that a special act, as opposed to an act of a general nature, is one that is local and temporary in its operation."

And again, in *State ex rel. vs. Spellmire et al.*, 67 Ohio State, 77, it is said, on page 83:

> "The above rules when carried to their full extent and import, prohibit special or lo-

cal legislation upon a subject-matter which is general in its nature, and which can be reasonably covered and provided for by a general law having a uniform operation operation throughout the State. And the best evidence that a subject-matter can be covered and provided for by a general law having uniform operation, is the fact that such general law has been passed upon that subject-matter. When such is the case, no local or special law can be constitutionally enacted on that subject-matter. If the subject-matter has not been covered by a general law having a uniform operation throughout the State, the members of the general assembly must form their best judgment under their oaths as to whether or not the subject-matter is of a general nature, and capable of being covered by a general law having such uniform operation, and vote accordingly, the final test as to its constitutionality resting with this Court. * * * "

(p. 86.) "This case and other California cases hold the constitutional provision of that State, in effect at least, only directory, while in this State we hold our provision mandatory. This being so, the rule of decision there cannot prevail here. With us 'uniform operation throughout the State' means universal operation as to territory; it takes in the whole State. And, as to persons and things, it means universal operation as to all persons and things in the same condition or category. When a law is available in every part of the State as to all persons and things in the same condition or category, it is of uniform operation throughout the State."

Both these cases are quoted with approval in a recent utterance of the Ohio Supreme Court in *Gentsch vs. The State ex rel,* 71 Ohio State, 151, where, after quoting from these cases, it is said:

(p. 165.) "It is apparent from these recent utterances of this Court, that the Court has never meant to be understood as denying the general doctrine, held everywhere and often approved here, that a statute in relation to a class, if its operation is not territorially restricted, is a general law. Classification is often proper and sometimes necessary in legislation, in order to define the objects on which the law is to take effect and in order to definitely apply and effectuate the purposes of the legislation. For example, married women and widows are recognized as two distinct classes for the purposes of legislation peculiar to each class, as are also corporations classed as railroad companies, street railroad companies, electrict interurban railroad companies, telegraph companies, telephone companies, express and insurance companies, etc. Many other illustrations may be found in the statutes of our State. In short, there could be very little general legislation without classification."

Cincinnati Street Railway Co. vs. Horstman, 72 Ohio St., 93 (73 N. E., 1075), February, 1905.

DAVIS, *C. J.:*

(p. 103.) "The defendant-in-error maintains that the Act is unconstitutional, and it was so held by the Court below. The theory upon which this contention is based is that the Act is special and that it confers corporate powers, thus infringing Section 1 of Article 13 of the Constitution, and also that it is a law of a general nature which does not operate uniformly throughout the State, violating Section 26 of Article 2 of the Constitution.

"Section 2505*d* contains the legislation which is especially assailed here, and it does

not require a critical reading to disclose the fact that it operates throughout the State upon every municipal corporation therein and upon every street railway corporation or company of the class defined in that Section. If it be true as argued by the defendant-in-error, and as held by the court below, that it is possible that some street railway companies may be excluded from the class, Section 26 of Article 2 of the Constitution would not thereby be violated * * *

(p. 105.) "But it is insisted that the act in question is not only a special act, but that it confers corporate powers in violation of Section 1 of Article 13 of the Constitution. * * *

"Adopting the language of the Superior Court, it is argued on behalf of the defendant-in-error, that corporate power is conferred in this act 'not generally but specially according to the particular circumstances of each particular case', and that 'the law is therefore a special law conferring corporate power'. This conclusion is reached through the following propositions:

"First, that the classification of street railways in Section 2505*d* is arbitrarily and unreasonably limited to such railroad companies as come into the control of the different lines by *lease or purchase* from other railroad companies or by the consolidation of different companies into a single company; and that it excludes from the enjoyment of the powers therein granted street railroad companies which may have come into the control of their lines by *original* or *renewed grants* from the municipal corporation itself.

(p. 108.) "But the conferring of corporate powers does not render the act invalid if it be not a special act. The act operates over the whole territory of the State, and it does not exclude any individual corporation

> of the class defined. How can the non-inclusion of an individual corporation which is *not* of the class defined, render the act special in its nature? The opinion of a court that the legislation is unwise or unjust cannot be the criterion. The legislative purpose very plainly was to secure to the public continuous passage over all routes in any municipality, uniformity and reduction of fares and uniformity in the expiration of franchises. The legislation sought to accomplish that purpose in general terms, by a definite classification, which does not contain within itself even a hint of a purely special application * * * We approve as the fair result of all the cases the statement of the law which is made in *State ex rel. vs. Parsons et al.*, 40 N. J. Law, 123, as follows: 'A law framed in general terms, restricted to no locality and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law.'"

As an illustration of the manner in which from time to time the Legislature of Ohio has undertaken to provide for corporate organization to meet particular situations, and with the approval of the highest Court of the State, we call attention to the Act of the General Assembly of Ohio which was passed and took effect April 4th, 1863; Volumne 60 of Ohio Session Laws, page 54 (which was offered in evidence in this case). That Act provided:

> "That the purchaser or purchasers of any railroad, situate wholly or partly within this State, which has been sold pursuant to Judicial order, judgment or decree, or to such order, judgment or decree and express power, or the survivor or survivors or the assigns

of such purchaser or purchasers, may acquire the franchise to be a corporation originally vested in the company which held the said railroad prior to such sale, by grant of said company under such terms and conditions as may be agreed upon by the directors of such company, with the consent of the stockholders owning two-thirds of the stock; which grant, being in the same form as is by law required to convey real estate, shall be effectual to pass the said franchise to the persons or company which shall have become the owners by purchase or assignment as aforesaid of such railroad."

It is entirely clear from the phraseology of the statute just quoted, that it was passed to meet a particular situation which had then arisen. Certain persons had become the purchasers at foreclosure of railroad property under a decree of the Court. To enable them to become incorporated upon the terms and conditions of the purchase, this Act was passed. It applied to that situation, but was general in its terms. This statute was attacked on the ground that it conferred by a Special Act corporate power, and was in violation of the Constitution of the State of Ohio, Section 1, Article 13.

The Supreme Court of Ohio in *State of Ohio vs. Sherman,* 22nd Ohio State, begining at page 411 sustained the constitutionality of this Statute; and this case has subsequently been cited with approval by the Ohio Supreme Court.

The gist of all these decisions may be expressed in the one sentence taken from *State ex rel. vs. Spellmire,* 67 Ohio State, on page 86: "When a law is available in every part of the State as to all persons and things in the same condition or

category, it is of uniform operation throughout the State." That is to say, such a law is general and not special, and therefore is constitutional.

The motion to dismiss the writ of error or to affirm the judgment of the New York Court of Appeals should be granted.

Respectfully submitted,

VIRGIL P. KLINE,
HENRY WOLLMAN
SHELDON H. TOLLES,
Counsel for The Andrews Institute for Girls.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 619.

SMITHSONIAN INSTITUTE and MELVILLE W. FULLER, as Chancellor of said Smithsonian Institution,

Plaintiffs-in-Error,

against

GAMALIEL C. ST. JOHN, as Executor and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, and EDITH A. LOGAN,

Defendants-in-Error.

Brief of Edith A. Logan, Defendant-in-Error, in Support of Motion to Dismiss Appeal.

HENRY M. EARLE,
Attorney for Edith A. Logan, Defendant-in-Error.

APPEAL PRINTING COMPANY, 31-35 VESEY STREET, NEW YORK.

Supreme Court of the United States.

SMITHSONIAN INSTITUTE and Melville W. Fuller, as Chancellor of said Smithsonian Institute, Plaintiffs-in-Error, against GAMALIEL C. ST. JOHN, as Executor and Trustee under the Last Will and Testament of Wallace C. Andrews, *et al.*, and Edith A. Logan, Defendants-in-Error.	No. 613. October Term, 1908.

Brief of Edith A. Logan, Defendant-in-Error in Support of Motion to Dismiss Appeal.

The errors assigned on behalf of plaintiffs-in-error are two in number and reduced to their simplest terms are as follows:

1. That the Court of Appeals of the State of New York erred in holding that the Act of the General Assembly of the State of Ohio of March, 1902, under which the Andrews Institute for Girls was incorporated, was not within the inhibition of Section One, Article Thirteen of the Constitution of the State of Ohio.

2. That said Court of Appeals in holding as above did not give full faith and credit to said section of the Ohio Constitution in contravention of Section I of Article IV of the Constitution of the United States.

It is perfectly evident that the two errors so assigned are interdependent and must stand or fall together.

Assuming that the plaintiffs-in-error properly raised the question, which is claimed to be a Federal question, in the New York Court of Appeals, it is respectfully submitted that the question raised appears upon the most casual inspection to be entirely without merit.

The Article and Section of the Ohio Constitution in question are as follows:

ARTICLE XIII.

"Section 1. The general assembly shall pass no special act conferring corporate powers.

Section 2. Corporations may be formed under general laws; but all such laws may, from time to time, be altered and repealed."

The Act of the General Assembly of Ohio of March, 1902, appears on pages 9 and 10 of the Record. The Andrews Institute for Girls was incorporated under such Act and the Charter of the Institute conforms in every respect to the terms of said Act.

The Courts of the State of Ohio are the highest authority in the construction of the Constitution of that State and while the constitutionality of the Act of 1902 has not yet been tested in the Ohio Courts, provisions of the constitution in question similar to Article XIII, Section I, have been judicially construed and the highest Courts of that

State have very clearly defined what is a general act and what is a special act.

> Platt v. Craigg, 66 Ohio State, 75.
> State *ex rel.* v. Spellmire, 67 Ohio St., 77.
> Cincinnati Street Ry. Co. v. Horstman, 72 Ohio St., 93.

The clearest statement on this point is contained in the opinion of the Supreme Court of Ohio in the case of Cincinnati Street Railway Co. v. Horstman, *supra*, at page 119 of the opinion as follows:

> "For the reason stated we approve as the fair result of all the cases the statement of the law which is made in State *ex rel.* v. Parsons, *et al.*, 40 N. J. Law, 123, as follows:
>
> " 'A law framed in general terms, restricted to no locality, and operating equally upon all groups of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law but a general law.' "

The above cited cases are absolute authority beyond a doubt that the Act of 1902 does not come within the definition of a special act but that it is a general act relating to persons, places and things as a class and is therefore not within the inhibition of Article XIII, Section I of the Ohio Constitution, for it is perfectly evident upon a mere inspection of the Act of 1902, that the same is not local or temporary and limited to individuals, but that, on the contrary, it is an act general in its scope, and is designed to cover the common case and all cases where property is devised or be-

queathed by will for charitable educational uses within Ohio, where the will contains a direction that a corporation be formed for the purposes of receiving the property so devised and bequeathed and of carrying out the charitable purposes expressed in the will.

The contention of the plaintiffs-in-error that the provision in the Act of 1902, providing for the incorporating into the charter of a charitable corporation formed under it of the provisions of the will, makes that act a special one, is entirely without force; and this for the very obvious reason that every corporation, charitable or otherwise, has its objects which are stated in the charter, which objects differ in the case of each corporation; and if the contention of the plaintiffs-in-error is correct, no act providing for the forming of corporations is a general act unless it provides for an absolute uniformity in the statement of the objects of corporations formed under it. Since the Act of 1902 was enacted to cover all charitable corporations directed to be formed by wills, and since such wills naturally contain directions as to the particular objects of such corporations, what is more natural that the objects of such corporations be stated in each case in the charter in the language of the will? And the very fact that the Act of 1902 is so broad as to include every charitable educational corporation directed to be formed by a will and as to give to each corporation so formed the very powers the will prescribes in the very words of the will itself entirely refutes the contention of the plaintiffs-in-error that the Act is a special one.

Nor does the fact that the Act of 1902, by its terms fits the situation created by the will of Wal-

lace C. Andrews, deceased make that statute which is otherwise a general statute, a special one. The act is constitutional or not according to its terms, and the fact that the Andrews will may have been the means of drawing the attention of the Ohio Legislature to the short-comings of the laws of that State governing charitable corporations furnishes no reason to hold the act in question unconstitutional.

Upon the whole the appeal herein is frivolous and without any merit whatever and in the interest of the speedy settlement and distribution of the Andrews Estate, such appeal should be dismissed.

Respectfully submitted,

HENRY M. EARLE,
Attorney for Edith A. Logan,
Defendant-in-Error,
No. 1 Nassau Street,
New York City.

Supreme Court of the United States.

SMITHSONIAN INSTITUTION and another,
Plaintiffs-in-Error,

against

GAMALIEL C. ST. JOHN, as Executor and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, *et al.*,
Defendants-in-Error.

BRIEF ON BEHALF OF NEXT OF KIN ON MOTION TO DISMISS OR AFFIRM.

The facts are fully set forth in the briefs submitted by counsel for the executor and for the Andrews Institute for Girls and will not be repeated here.

I.

The Smithsonian Institution did not at any time contend that a Federal question was involved in this case until it made its application to the Court of Appeals for a reargument, after that Court had decided against its contentions.

The Smithsonian Institution asked that if a reargument be not allowed, then some modification be made in the language of the opinion of the Court so that it should clearly appear that a Federal question was raised upon the record (R., p. 59). The Court of Appeals denied the motion for a reargument, "no Federal question having been raised in this Court" (R., p. 60).

It is too late to raise a Federal question reviewable by this Court on a motion for rehearing in the State Court, unless that Court entertains the motion and expressly passes upon the Federal question.

Disconto Gesellschaft vs. Umbreit, 208 U. S., 570.
Pine vs. St. Louis, 165 U. S., 273.
Fullerton vs. Texas, 196 U. S., 192.
McMillen vs. Ferrum Mining Co., 197 U. S., 343, 347.
French vs. Taylor, 199 U. S., 274, 278.
Mutual Life Ins. Co. vs. McGrew, 188 U. S., 291, 308.

II.

The Smithsonian Institution in its amended answer (R., p. 13), alleged that the act of the General Assembly of the State of Ohio, under which it alleged that the Andrews Institute for Girls was organized, was repugnant to the Constitution of the State of Ohio; and the Smithsonian Institution asked the Courts of the State of New York to hold that this act of the Ohio Legislature was void, because in violation of the Constitution of that State, in that it was a special act conferring corporate powers. Such a claim, however, does not raise a

Federal question. The mere *construction* by a State Court of a statute of another State, without questioning its validity, does not deny to it the full faith and credit demanded by the statutes in order to give the Supreme Court jurisdiction.

Allen vs. Allegheny Co., 196 U. S., 458.
Chicago Railroad Co. vs. Wiggins Ferry Co., 119 U. S., 615.
Glenn vs. Garth, 147 U. S., 360.
Lloyd vs. Matthews, 155 U. S., 222.
Banholzer vs. New York Life Insurance Co., 178 U. S., 402.
Johnson vs. New York Life Insurance Co., 187 U. S., 491.
Finney vs. Guy, 189 U. S., 335.

It appears very distinctly from the opinion of the Court of Appeals that that Court gave full force and effect to the provisions of the Ohio Constitution, but held that the statute in question was not a special act conferring corporate powers (R., p. 50). The same ruling was made by the Appellate Division of the Supreme Court (R., pp. 41, 42). The decision of the State Court having been in favor of the validity of the Ohio statute and in no wise questioning the binding force of the Ohio Constitution, no Federal question arises sufficient to give jurisdiction to the Supreme Court of the United States.

If the validity of this statute had been attacked in the courts of Ohio, there can be no doubt that the decision of the highest court of that State could not have been reviewed here.

Whether a State statute is or is not in accordance with the requirements of the constitution of such State is not a Federal question.

Leeper vs. Texas, 139 U. S., 462.

Murray vs. Louisiana, 163 U. S., 101, 108.

Mobile, Jackson, &c., R. R. Co. vs. Mississippi, 210 U. S., 187.

Apparently, however, the broad contention is made by the plaintiffs-in-error that whenever the validity of a State statute is attacked in the courts of another State on the ground of repugnance to the State Constitution, a Federal question is presented, even though the validity of the statute be upheld.

The only "title, right privilege or immunity" under the Federal Constitution which the plaintiffs in error can pretend to have set up and claimed—and such claim is to be found for the first time in the motion for a reargument in the Court of Appeals (R., p. 59)—is founded upon the provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. The full faith and credit clause prescribes a rule of evidence rather than of jurisdiction (*Wisconsin* vs. *Pelican Ins. Co.*, 127 U. S., 265, 291). The New York Courts were asked to construe a statute of the State of Ohio and to say that it offended against the Constitution of that State. We submit that the New York Courts, in construing this statute as a general and not a special act, were in no sense failing to give full faith and credit to the Constitution of the sister State.

The New York Court of Appeals say that the Act of the Ohio Legislature "would not seem to be a violation of the Constitution of that State," citing five cases decided by the highest Court of Ohio (R., p. 50). The meaning of the Ohio Constitution was sought in the decisions of the Ohio courts, as well as confirmed by an independent construction, and in such a case the Federal question is not presented.

Banholzer vs. N. Y. Life Ins. Co., 178 U. S., 402.

III.

There is nothing in this case which establishes the fundamental proposition of the Smithsonian Institution that the Andrews Institute for Girls was organized under the Act of March, 1902. The trial Court found that the executor procured a corporation to be formed under the laws of the State of Ohio (R., p. 19) and, as is more fully explained in the brief of counsel for the Andrews Institute, that corporation might well have been organized even though this special act had never been passed. The Court of Appeals said :

> "If we *assume* that such act was passed to aid in the incorporation of the Andrews Institute for Girls, it is not necessarily unconstitutional" (R., p. 50).

It does not appear that it has been held by the courts of New York that the Andrews Institute was organized under this act, and there is nothing in this record to prove that if this act is void then the Andrews Institute cannot and does not legally exist. If, however, it be the fact that the Andrews Institute was organized under the Act of 1902, it is very plain from the decisions of the highest courts of the State of Ohio that this act does not violate the provisions of the Constitution of that State.

Platt vs. Craig, 66 Ohio State, 75.
State *ex rel.* vs. Spellmire, 67 Ohio State, 77.
Gentsch vs. State of Ohio, 71 Ohio State, 151.
Cincinnati Street Ry. Co. vs. Horstman, 72 Ohio State, 93.

IV.

The Andrews Institute for Girls is a *de facto* corporation organized under the Laws of the State of Ohio. The Articles of Incorporation are set forth in the Record, at page 11. The Secretary of State of Ohio has certified that these Articles of Incorporation are recorded in his office. The courts of the State of New York were bound to recognize the existence of the Andrews Institute for Girls and could not question its existence as a corporation.

Merrick vs. Van Santvoord, 34 N. Y., 208.

U. S. Vinegar Co. vs. Schlegel, 143 N. Y., 537.

Whether the Act of 1902 is constitutional or not, the Andrews Institute continues to be the corporation organized by the executor to take this gift, and until its franchise is annulled by competent authority it must be deemed to be the residuary legatee under the will of testator.

Even if this Court should be of the opinion that the Ohio Act of 1902 in a special act conferring corporate powers and is therefore repugnant to the Ohio State Constitution, still there is nothing before the Court to warrant any interference with the judgment appealed from. On the record before this Court the judgment is right in any event. The Smithsonian Institution will have to procure the annulment of the charter of the Andrews Institute for Girls by a direct proceeding in the courts of Ohio before it can be said that the corporation contemplated by the testator does not yet exist (*Central Ass'n* vs. *Alabama Ins. Co.*, 70 Ala., 120; *County of Macon* vs. *Stores*, 97 U. S., 272; 2 Cook on Corporations, § 637; Cooley's Constitutional Limitations, 311). And even then the

residuary estate will not pass to the Smithsonian Institution, because the charitable corporation contemplated by the testator may be formed at any time during the life of the executor, and the intention of the testator cannot be said to have failed so long as Mr. St. John lives.

V.

In conclusion, we submit :

(1) That no Federal question is presented ;

(2) That if there be a Federal question it was not raised in time ;

(3) That if there be a Federal question it is so frivolous as not to need further argument.

Respectfully submitted,

HAROLD NATHAN,
Attorney and of Counsel for Defendant-in-Error, Norman C. Andrews *et al.*

Office Supreme Court, U. S.
FILED.
JAN 4 1909
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 613.

SMITHSONIAN INSTITUTION and MELVILLE W. FULLER, as Chancellor of said Smithsonian Institution,

Plaintiffs-in-Error,

vs.

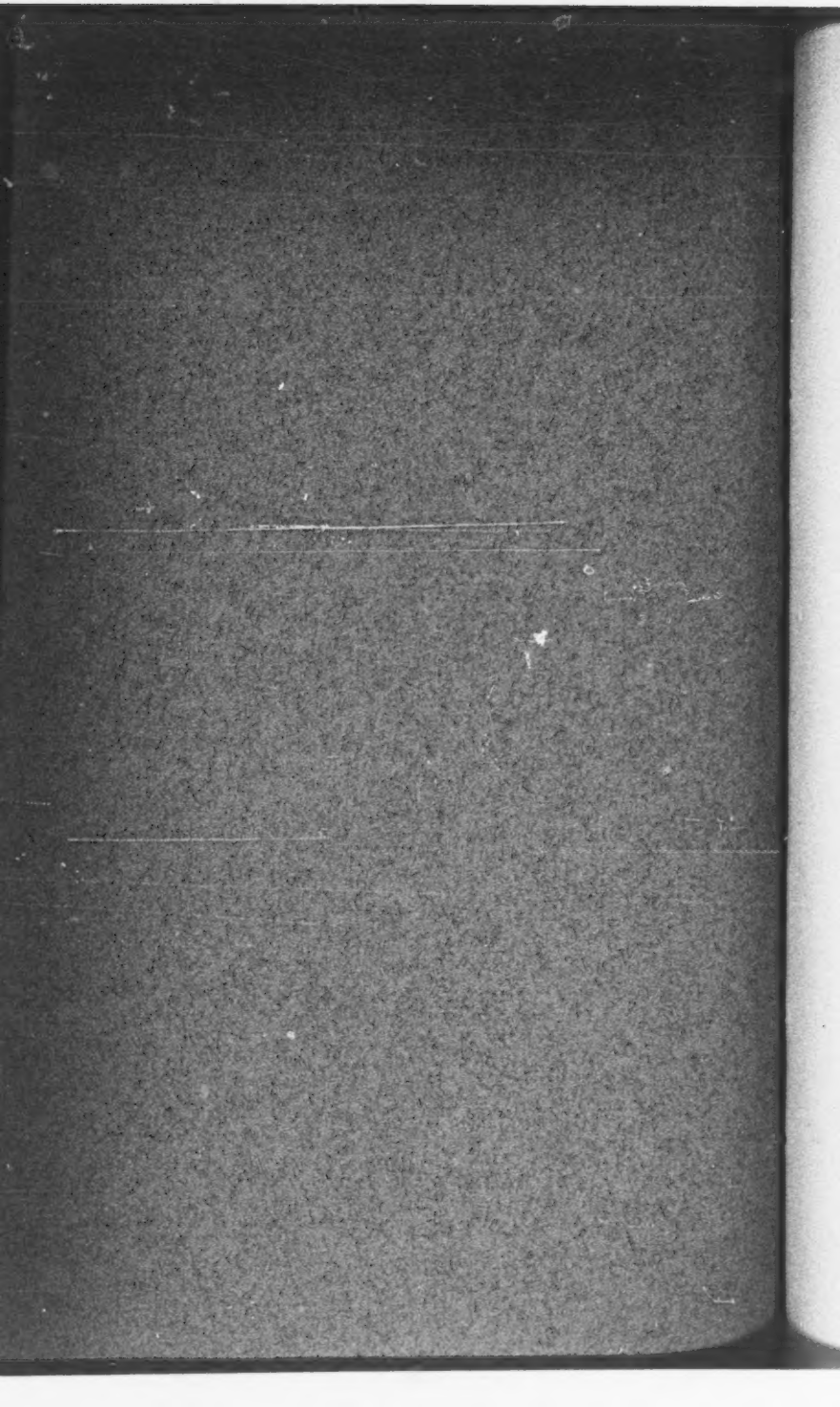
GAMALIEL C. ST. JOHN, as Executor and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, et al.,

Defendants-in-Error.

Reply Brief for Defendants-in-Error, in Support of Motion to Dismiss or Affirm.

In Error to the Supreme Court of the State of New York.

APPEAL PRINTING COMPANY, 34-34 VESEY STREET, NEW YORK.



Supreme Court of the United States.

SMITHSONIAN INSTITUTION and another,
Plaintiffs-in-Error,

v.

GAMALIEL C. ST. JOHN, as Executor, &c., and others,
Defendants-in-Error.

No. 613.
October Term, 1908.

Reply Brief for Defendants-in-Error, on Motion to Dismiss or Affirm.

Defendants-in-error deem it proper to reply to certain portions of the brief of plaintiffs-in-error.

This brief consists largely of assumptions. On page 5 of their main brief and elsewhere they make certain assertions as to the effect of the Ohio Constitution and as to what they claim to be self-evident truths respecting it (which assertions wholly beg the question), and because the Court of Appeals failed to accept these assertions as law, they say it failed to give full faith and credit to the Ohio Constitution. They assume that the Act of 1902 is invalid under the Ohio Constitution, but nowhere do they show, by any argument or Ohio authority, that it is unconstitutional. Upon that

assumption they place their entire claim that the New York Courts failed to give full faith and credit to the Ohio Constitution. On the other hand, we have shown in our main briefs that the act is clearly valid under the provisions of the Ohio Constitution in the light of the decisions of the highest Court of that State which we cite.

On page 20 of their main brief plaintiffs-in-error admit that a decision by the New York Courts holding the Act of 1902 to be constitutional, would not present a Federal question. On that page, referring to the point in the brief for The Andrews Institute that "the Act of 1902 complained of was not a special act such as is inhibited by the Ohio Constitution," they say: "Since the New York Courts (according to counsel's Second Point), hold the Act of 1902 to be constitutional and since such a holding does not present a Federal question, we need not discuss this point, although the Ohio counsel have devoted several pages thereto."

On page 9 of their main brief they say: "The Court indeed does not assume to deal with the language of the Ohio Constitution, or with the language of any statute of Ohio." They also say, on the same page: "There is not the slightest intimation in the opinion of CHASE, J., that the Court had so much as looked at the Constitution of Ohio."

On the contrary, the fact is that the opinion of Judge CHASE (Rec., pp. 47 and 48) refers distinctly to the Laws of Ohio and to the findings of the Trial Court respecting them, and again (Rec., p. 49), the opinion refers to a decision of the Ohio Supreme Court that a gift to a corporation to be formed is valid. On page 50 of the

Agreed Record also the learned Judge refers to the General Statutes of Ohio relating to corporations and the Act of 1902 (which plaintiffs-in-error complain of), mentions expressly Article 13, Section 1, of the Constitution of Ohio, and quotes decisions of the Ohio Supreme Court to the effect that the Act of 1902 is not a violation of that provision of the Ohio Constitution, using among other expressions, the following language:

> "The act so passed by the general assembly of the state of Ohio in 1902 would not seem to be a violation of the Constitution of that state. (Platt v. Craig, 63 Ohio St., 75; State *ex rel.* v. Spellmire, 67 Ohio St., 77; Gentreh v. State of Ohio, 71 Ohio St., 151; Cinn. Street R. R. Co. v. Horstmann, 72 Ohio St., 93; State of Ohio v. Sherman, 22 Ohio St., 411.)"

Plaintiffs-in-error rely in their briefs in this Court on what they claim to have said in their brief and orally in the Court of Appeals, but the brief and oral argument are not a part of the record, and are not made so by their affidavit for a re-argument (Rec., p. 59). Protesting against this reference to brief and argument as immaterial and improper, nevertheless, as the reference is so persistent, we reply.

On page 3 of their main brief plaintiffs-in-error recite what their argument in the Court of Appeals was, to wit, first, that The Andrews Institute was not the corporation intended by the testator (concededly not a Federal question), and, second, that, if it were held to be, it would violate the prohibition in the Ohio Constitution against special acts of incorporation (no hint here of a Federal question).

Although the affidavit for a re-argument (Rec.,

p. 59), seems to say that the Constitution of the United States was called to the attention of the Court of Appeals on the argument and in their brief in that Court, it manifestly is not meant that any express mention thereof was made (which would have been contrary to the fact), but only that in the opinion of counsel attention had been called to it inferentially. This appears from the fact that in both their briefs in this Court when reciting their argument in the Court below, they refer only to the Ohio Constitution being brought in question, never to the Federal Constitution, and from the fact that on page 4 of their main brief they admit that the Federal Constitution was first mentioned in their affidavit for a re-argument, using the following language: "By filing this affidavit the appellants directed the attention of the Court specially to the circumstance that their contention in argument had been as is now set forth; and that such contention was a claim of right set up by them under Article 4, Section 1, of the Constitution of the United States." See, also, p. 14 of their Main Brief, and pp. 12 and 13 of their Appendix Brief.

On page 15 of their main brief, referring to the point made in the brief of The Andrews Institute in this Court, that "if there had been a so-called Federal question, it was presented too late," plaintiffs-in-error use this language: "It was presented in argument at the hearing before the Court of Appeals. Counsel are mistaken in saying (p. 25) that 'the attention of the Court of Appeals was first drawn to the so-called Federal question in the motion for reargument.' Counsel seems to think that it was our duty to pronounce the words 'Federal question' or 'Constitution of the United States' in

the hearing of the judges in order to attract their attention."

Again on page 4 of their main brief they say: "The affidavit respectfully suggested that the argument upon this point submitted by the Smithsonian Institution might have been overlooked or misapprehended by the Court of Appeals." See also Agreed Record, p. 59. The Court of Appeals evidently did overlook or misapprehend their argument if it was intended to raise a Federal question, which that Court would not have done if its attention had been clearly called to the Federal Constitution as it is the duty of a party intending to rely on it to do.

The Federal question was evidently an afterthought when the Court of Appeals had decided against them, and the language of GRAY, J., in Scudder v. Coler, 175 U. S., 32, 36, is strictly applicable, to wit: "It is impossible upon this record to avoid the conclusion that it never occurred to the plaintiff-in-error to raise a Federal question until after the case had been finally decided against him in the highest court of the state."

On page 4 of their main brief they state, referring to the affidavit for re-argument: "it pointed out to the court certain portions of its *brief*, consisting of five pages at one place and ten pages at another place, where this position had been taken and a full discussion presented." This is incorrect, for there was never a reference made to the Federal Constitution nor to any Federal question in any brief. The affidavit itself (Rec. p. 59) contains this language: "That the points supposed to have been overlooked or misapprehended by the Court are contained in the following pages of the *case*: pp. 18 to 22 inclusive, 44 to 53 inclusive, and 507."

The "case" referred to is the record in the Court of Appeals. Pages 18 to 22 contain the Will of decedent, to be found at pages 5-8 of the Agreed Record; pages 44 to 53 of the case contain the Act of 1902 and the Charter of The Andrews Institute for Girls, to be found at pages 9-12 of the Agreed Record; page 507 of the case contain extracts from the Ohio Constitution, to be found on pages 25 and 26 of the Agreed Record. No hint of a Federal question.

It is safe to assume that if the brief of plaintiffs-in-error in the Court of Appeals had made the slightest mention of the Constitution of the United States or of a Federal question, such portion of the brief would have been set out in this affidavit, counsel well knowing that the brief was no part of the record.

The argument of plaintiffs-in-error is vitiated by a fundamental fallacy as to the prohibition in the Ohio Constitution. They assume that its language is, "No act shall be passed creating corporations with special powers," whereas the language actually is, "No special act conferring corporate powers." There is no prohibition against a general act under which corporations with different, that is, special powers, may be created, some for banking, some for manufacturing, some conferring on their Presidents or Boards of Directors limited and some wide powers, &c. This has been held in Ohio cases cited in our main briefs. That fallacy leads to a second one, that an act, in itself a general one may be made a special act by the filing of a charter under it. The act is either general or special when enacted, and so remains during its life. When a charter is filed purporting to rely on the act, it has no effect on the act. The only legiti-

mate question respecting it is, "Does the charter comply with the act? Is it within the purview of the act?"

The contention of the plaintiffs-in-error would render abortive the attempt of any testator through a corporation to establish a charitable institution in Ohio, however laudable, if he desired to put any limitations or restrictions upon it at all, or to engraft on it any special features, such as that it should bear his name. No Court will ever hold that the people of Ohio intended such a result, nor ever construe the Constitution of Ohio as producing such an absurdity.

The contention of plaintiffs-in-error, that because the Court of Appeals in its opinion (Rec., p. 51), refers to the fact that the Will of Mr. Andrews is made a part of the articles of incorporation, therefore that Court must have decided that such recital made the alleged restrictions of the Will effective, is not justified. The evident purpose of the Court was merely to show that the copying of the Will into the articles of incorporation identified the corporation as the one intended by the testator. There is nothing in the opinion to show that the Court of Appeals deemed the alleged restrictions in the Will to be a necessary charter provision or to be in fact effective as absolute restrictions. It may well have been of the opinion that they were not necessary, and the force of its language (Rec., p. 51), is simply, that if they were in any respect effective, there was a remedy at the suit of the Attorney-General of the State of Ohio. This remedy would have been just as effective if the Will had not been copied into the articles of incorporation.

The burden is not on us to show that the Court

of Appeals took this view, but on plaintiffs-in-error to show that it did not, if they claim that such negation brings in a Federal question.

To state the same point in another form, the purpose of the Court of Appeals in referring to the fact that the Will was contained in the articles of incorporation, and that the act itself authorized the Attorney-General of the State by proper action to see to it that the purposes named in the Will were carried out, may well have been to indicate that the Will is required by the statute to be set forth in the articles of incorporation, not as a limitation upon corporate power, but in order that the terms of the gift may be made matter of public record so that the attention of the proper officials of the state and of the corporation may be directed thereto to the end that the conditions of the gift shall be fully complied with.

It is submitted that Paragraph Five of the Will (Rec., pp. 6 and 7), does not require that the details which the testator desired relative to the school, shall be expressed in the charter. They do not belong there, but are directions or suggestions as to the management after the corporation is chartered. The number of the board of directors and their qualifications do belong in the charter, but in the Andrews Will (Rec., p. 7) the requirements as to the directors are not intended to be absolute, but are qualified by the words, "if and so far as may be consistent with law and practicable." The words therefore in the Will, coming after the details specified by the testator as to the departments and inmates of the school, and as to the management of the fund, to wit, "the charter of said corporation shall *also* provide" (Rec., p.

7), are merely an inaccurate expression. (It is this word "also" upon which plaintiffs-in-error base their entire argument that the details with reference to the school and the fund shall be embodied in the charter as controlling provisions.) The meaning is the same as if, after mentioning the departments of the school, the sum to be used in the buildings, etc., testator had said "there shall also be a board of directors consisting * * * and this shall be provided for in the charter." The language of the Will is directory, not mandatory. These details are not of the essence of the gift. The gift (that is, the establishing of an institution for the free education of girls) was the primary object; the special details were a secondary purpose.

Bird v. Merklee, 144 N. Y., 544.
Matter of Crane, 12 App. Div., 271, 275 (aff'd on Opinion below, 159 N. Y., 557).
Matter of Griffin, 167 N. Y., 71, 84.
Johnston v. Hughes, 187 N. Y., 466.
St. John v. Andrews Institute, 117 App. Div., 698, 719.

On page 8 of their appendix brief, plaintiffs-in-error say: "Had the New York court decided that Mr. Andrews did *not* require certain limitations and restrictions to be embodied in the charter of the corporation to which he was to give the residue of his estate, that decision, however erroneous in fact, would have shut out any right of the Smithsonian Institution to complain that a Federal question had been ignored."

The contention that the Andrews Institute is not the corporation intended by the testator, was

taken for the first time in the Court of Appeals. It was not raised below. On this objection see Dammert v. Osborn, 140 N. Y., 30, 44, *et seq.*

a. The Court of Appeals never decided the reverse of this statement, and thus the foundation on which plaintiffs-in-error seek to erect their Federal question is gone, or, rather, never existed.

The argument of plaintiffs-in-error, as gathered from the various branches of the brief filed herein, reduces itself to this:

They say, in view of the fact that the testator by his Will gave certain property to a corporation to be formed under the laws of the State of Ohio for the purpose of administering a certain fund and, as they say, the Will attached certain conditions to the gift and certain limitations upon the manner in which the funds thus given should be expended, that, therefore, no incorporation could legally take the gift, unless, by its charter, its powers as a corporation were limited in accordance with the limitations which they say the Will attached to the gift.

From this, they contend that when the New York Court of Appeals adjudged that The Andrews Institute for Girls was a valid corporation entitled to the gift, it must be assumed to have held that what plaintiffs-in-error call limitations set forth in the Will were limitations upon the corporate powers of the corporation which must necessarily have been embodied in its charter. They contend, therefore, that the Ohio Statute of 1902 which required Wills, to carry out whose purposes corporations were formed, to be made a part of the articles of incorporation, became in this case a special act conferring corporate powers, even though ten thousand corporations might be formed there-

under each with a Will attached to its articles of incorporation.

Assuming, as plaintiffs-in-error do, that the Act of 1902 is unconstitutional, because of their contentions just set forth, they further contend that the New York Courts necessarily ignored the Ohio Constitution when they either declared the Act of 1902 constitutional or failed to declare it unconstitutional, and therefore, a Federal question was necessarily involved in the case, although no hint of it was given until the motion for reargument in the Court of Appeals.

These assumptions and contentions, as we have seen, are unfounded.

Respectfully submitted,

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[4897]

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Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 613.

SMITHSONIAN INSTITUTION and MELVILLE W. FULLER, as Chancellor of said Smithsonian Institution,

Plaintiffs-in-Error,

vs.

GAMALIEL C. ST. JOHN, as Executor and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, et al.

Brief for Defendant-in-Error St. John, as Executor, etc., in Support of Motion to Dismiss or Affirm.

In Error to the Supreme Court of the State of New York.

APPEAL PRINTING COMPANY, 32-34 VESEY STREET, NEW YORK.

Supreme Court of the United States.

SMITHSONIAN INSTITUTION and another,
Plaintiffs-in-Error,

v.

GAMALIEL C. ST. JOHN, as Executor, &c., and others,
Defendants-in-Error.

No. 613.
October Term, 1908.

Brief and Argument for said Defendant-in-Error St. John, in Support of Motion to Dismiss or Affirm.

In the State Courts, plaintiffs-in-error objected to the Executor taking sides in the controversy involved. Besides being charged with the general duty of carrying out the will of the testator, he was specially and unqualifiedly directed by the fifth clause of the Will, as we shall hereinafter see, to incorporate an institution in Ohio, and, therefore, was specially bound to support it. The Courts of New York have held that it is the duty of Executors and other Trustees, by appeal or otherwise, to support the trusts with which they are charged.

Rothschild v. Goldenberg, 103 App. Div., 235, 242.

Matter of Title Guarantee & Trust Co., 114 App. Div., 778, 779, 780 (aff'd, 188 N. Y., 542).

Cuthbert v. Chauvet, 136 N. Y., 326, 332.

Facts.

(References are to pages of the Agreed Record.)

The action below was commenced in the Supreme Court of the State of New York in and for the County of New York, by defendant-in-error St. John, as Executor of and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, for the construction of said Will and the determination of the rights of the parties thereunto against The Andrews Institute for Girls (which had been formed by the Executor as directed in the Will of said deceased); the Smithsonian Institution and Melville W. Fuller, as Chancellor of the Smithsonian Institution; the Attorney-General of the State of New York (as a proper party under Chapter 701 of the Laws of 1893), the heirs-at-law and next-of-kin, and others having possible interest under the Will of the deceased.

The amended and supplemental complaint was verified April 20, 1904 (Rec., p. 2). The amended answer of the defendants Smithsonian Institution and Melville W. Fuller, as Chancellor thereof, was verified June 12, 1905 (Rec., p. 13); and the amended answer of The Andrews Institute for Girls was verified June 17, 1905 (Rec., p. 16).

Thereafter the action was tried before Mr. Justice VICTOR J. DOWLING, without a jury, and upon his decision judgment was duly entered on the 25th day of January, 1906 (Rec., pp. 20, 21), adjudging, among other things, that The Andrews Institute for Girls was entitled to the residuary estate of said Wallace C. Andrews, deceased, together with the income thereof which had accrued since the death of said deceased, after paying the expenses of administration.

That the heirs and next-of-kin had no interest in the estate of said deceased; and,

That the Smithsonian Institution had no interest in the said estate.

The Smithsonian Institution and others appealed from that judgment to the Appellate Division of the Supreme Court, First Judicial Department, which unanimously affirmed said judgment April 10, 1907 (Rec., p. 36).

The Smithsonian Institution and others appealed from the judgment of the Appellate Division to the Court of Appeals of the State of New York, and that Court, by its amended remittitur, dated the 16th day of June, 1908 (Rec., pp. 42-44), modified the judgments below, by providing that the next-of-kin who appealed were entitled to their respective shares of the income which accrued upon the estate of said deceased from the date of his death to the date of the incorporation of The Andrews Institute for Girls, but, in all other respects, affirmed the said judgments below. Judgment upon said remittitur was duly entered in the Supreme Court on the 26th day of June, 1908 (Rec., pp. 44, 45).

It appeared from the complaint (Paragraphs First, Second and Third), and was not denied by the answers, that the said Wallace C. Andrews, a resident of the County and State of New York, died in that County on the 7th day of April, 1899, seized of certain real property and possessed of certain personal property, leaving a Last Will and Testament, which was duly admitted to probate by the Surrogates' Court of the County of New York, on the 22d day of May, 1899, and duly recorded; that the testator's wife, Margaret M. St. John Andrews, died on the same seventh day of April, 1899; and that the plaintiff, Gamaliel C. St. John, duly qual-

ified and entered upon his duties as Executor of said Will (Rec., p. 2).

The Will of the testator after providing for certain legacies, and for a life estate to his wife, contained the following provisions (Rec., pp. 6, 7):

> Fourth. Upon the death of my said wife, I devise and bequeath to the corporation hereinafter directed to be formed, all the excess and residue of my estate over the sum of Five hundred thousand dollars specified in the third paragraph hereof.
>
> Fifth. I direct my executor and executrix as soon as practicable after my decease and during the lives of my said wife and her said brother [defendant in error Gamaliel C. St. John] or the life of the longest liver of them, to procure under the laws of the State of Ohio an incorporation to be formed with proper powers, for the purpose of establishing an institution * * * in the town of Willoughby, Lake County, Ohio * * * for the free education of girls and for their support in proper cases during education, with a special view toward rendering them self supporting.
>
> Said institution shall contain, among others, a sewing department, cooking department, designing department and departments of phonography and typewriting and other useful work that would afford the pupils employment in life, including such new discoveries and inventions as may be made from time to time tending to enlarge the opportunities for useful and honorable employment for women, and such as will aid them in obtaining

honorable and independent positions in life. Such school to be open only to girls between the ages of 10 and 16, both inclusive. * * *

The charter of the said corporation shall also provide, if and so far as may be consistent with law and practicable, for the management of the said corporation by a board of five directors, to consist of the governor for the time being of the State of Ohio, the member of congress for the time being for the congressional district embracing the said town of Willoughby, the treasurer for the time being of the said county of Lake, the mayor for the time being of Willoughby, and the said Gamaliel C. St. John, and for the choice of a resident of Willoughby by the said governor as successor to the said St. John as often as the fifth place shall become or be vacant.

Eighth. In case my intention with respect to the said institution for girls shall because of illegality fail, or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution at Washington, District of Columbia, to be devoted to the purposes for which it was established.

The Trial Court made various findings of fact, among others the following (Rec., pp. 19, 20):

91. On or about the 13th day of May, 1902, Gamaliel C. St. John, the surviving executor named in the will of Wallace C. Andrews, procured an incorporation to be formed under the laws of the State of Ohio, entitled The Andrews Institute for Girls, located in said State, "for

the purpose," as expressed in the certificate of incorporation, "of receiving the property devised and bequeathed in and by the wills of Wallace C. Andrews and Margaret M. St. John Andrews, late of the City and State of New York, to the corporation therein provided to be formed, and for the purpose of carrying out the charitable purposes in such wills expressed and of establishing and maintaining the institution therein provided for."

113. Said corporation was organized and accepted the gift under testator's will May 29, 1902.

92. Under the laws of the State of Ohio, The Andrews Institute for Girls has capacity to take the gift under the 4th, 5th and 6th clauses of the will of Wallace C. Andrews, deceased.

87 and 112. The provisions of the 4th, 5th and 6th clauses of said will, and the gift thereunder, are, and at the time of testator's death were, valid under the laws of the State of Ohio.

93. The Smithsonian Institution was established in the District of Columbia by act of Congress and was given power to receive money or other property by gift, devise or bequest, prior to the death of Mr. Andrews.

88. The Smithsonian Institution has, and at the time of decedent's death had, capacity to take under the provisions of the 8th clause of his will.

> 125. The Constitution of Ohio provides that the General Assembly shall pass no special act conferring corporate powers; that corporations may be formed under general laws, and all such laws may from time to time be altered or repealed; and that all laws of a general nature shall have a uniform operation throughout the state.

This Court is concluded by the findings of fact made in the State Court.

> Lloyd v. Matthews, 155 U. S., 222;
> Bement v. Nat. Harrow Co., 186 U. S., 70, 83;
> Minneapolis & St. Louis R. R. Co. v. Minnesota, 193 U. S., 53, 64, 65.

After the decision of the Court of Appeals, the present plaintiffs-in-error moved for a reargument (Rec., pp. 58, 59), which motion was denied by the said Court, on the ground that no federal question had been raised in that Court, and the order of denial was entered on the 12th day of June, 1908 (Rec., p. 60).

In the affidavit on that motion reference is made to the brief for plaintiffs-in-error, but briefs are not part of the record and cannot be used as the basis of a writ of error, even when they refer to the U. S. Constitution, which was not the case here.

> Zadig v. Baldwin, 166 U. S., 485;
> Chapin v. Fye, 179 U. S., 127;
> Harding v. Illinois, 196 U. S., 78, 84.

Thereafter, the plaintiffs-in-error sued out a writ of error to this Court, and assigned the following errors (Rec., p. 62):

1st. "That, after holding that by virtue of the act of the General Assembly of Ohio of March, 1902, the will of Mr. Andrews had been constituted a part of the articles of incorporation of The Andrews Institute, incorporated under that act, so as to make the limitations and restrictions of said will effective as charter provisions, the Court did not apply to the said act of 1902 the inhibition of section 1, article 13, of the Constitution of Ohio, forbidding the General Assembly to pass any special act conferring corporate powers."

2nd. "That the Court in contravention of section 1 of article 4 of the Constitution of the United States, failed to give full faith and credit to section 1, article 13, of the Constitution of Ohio, forbidding the General Assembly to pass any special act conferring corporate powers, though asked so to do in the event it should hold that the limitations and restrictions of Mr. Andrews' will became effective by being made a part of the articles of incorporation, which holding it did make."

In the Courts below, questions of survivorship in a common disaster, of the applicability of Chapter 360 of the Laws of 1860 of New York (Rec., pp. 51, 52), and of the ownership of income accruing between testator's death and the incorporation of The Andrews Institute for Girls were passed upon, but they are not material here.

The case in the State Courts is reported in

117 App. Div., 698; 191 N. Y., 254.

POINT ONE.

No federal question is involved in this case.

What the Courts of New York did, so far as

they passed upon the Statute of 1902 of the State of Ohio (Rec., pp. 9-11), was to construe it in connection with the Constitution of that State and determine whether within the meaning of Section 1, Article 13, of that Constitution the act was a special or a general act. If the action of these Courts be considered as the construction of a statute, the case comes *expressly* within repeated decisions of this Court, and if it be considered as the construction of a constitutional provision, it comes *logically* within those decisions, since, so far as the existence of a federal question is concerned, there is no difference in principle between passing upon a statute to determine its meaning and in passing upon a constitutional provision to determine *its* meaning.

The Courts of New York nowhere denied or questioned the validity of the constitutional provision of Ohio, but recognized its existence and force in their opinions, admitted it in evidence (Rec., pp. 25, 26), and expressly found it as a matter of fact (Finding 125, Rec., p. 20; Opinion of Appellate Division, Rec., p. 42; Opinion of Court of Appeals, Rec., p. 50).

It is only when the power to enact a statute, as it is by its terms or is made to read by construction, is fairly open to denial and denied, that the validity of such statute is drawn in question (Baltimore & Potomac R. R. Co. v. Hopkins, 130 U. S., 210, 224).

In *United States v. Lynch*, 137 U. S., 280, 285, it was claimed that there was an invalid exercise of authority under the United States and hence that the validity of the authority was drawn in question. This Court says:

> "In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

When in the Courts of a State the validity of a statute of another State is not drawn in question, but only its construction, no federal question arises.

> Lloyd v. Matthews, 155 U. S., 222;
> Allen v. Alleghany Co., 196 U. S., 458;
> Glenn v. Garth, 147 U. S., 360.

In Baltimore & Potomac R. R. Co. v. Hopkins, 130 U. S., 210, 223, this Court says:

> "In Commercial Bank of Cincinnati v. Buckingham, 5 How., 317, where a general law had declared all banks liable to pay six per cent. interest on their notes, when they had refused payment on demand, and a subsequent act incorporating the bank in question provided for the payment of twelve per cent., and the question was whether the bank was liable to pay eighteen, this Court held that the question submitted to and decided by the State Court was one of construction and not of validity. There both the prior and subsequent statutes were admitted to be valid under any construction of them, 'and therefore no construction placed by the state court on either of them could draw in question its

validity as being repugnant to the Constitution of the United States or any act of Congress.'"

In Johnson v. New York Life Ins. Co., 187 U. S., 491, 495, 496, this Court says:

"The Supreme Court of Iowa did not fail to give due faith and credit to the notice law of New York, since it was fully considered and the decision of the state courts of New York were called to its attention and cited in its opinion. * * * Whether the Supreme Court of Iowa was correct in its construction of the applicability of the New York notice statute to this policy was immaterial, since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case. The case is covered by that of Banholzer v. N. Y. Life Ins. Co., 178 U. S., 402, and in principle by Glenn v. Garth, 147 U. S., 360; Lloyd v. Matthews, 155 U. S., 222. To hold otherwise would render it possible to bring to this Court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment. The validity of the New York statute was not called in question. The case turned upon its construction. This was not a federal question (Commercial Bank v. Buckingham, 5 How., 317; Baltimore, &c. v. Hopkins, 130 U. S., 210)."

In Glenn v. Garth, 147 U. S., 360, it is said that the distinction between the construction of a statute and the validity of a statute has frequently been adverted to by this Court.

A.

In Hamblin v. Western Land Co., 147 U. S., 531, 532, this Court said:

"It is doubtful whether there is a federal

> question in this case. A real and not a fictitious question is essential to the jurisdiction of this Court over the judgments of state courts. (Millingar v. Hartupee, 6 Wall., 258; New Orleans v. New Orleans Water Works Co., 142 U. S., 79, 87). In the latter case it was said that 'the bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in any case and the jurisdiction of this Court invoked simply for the purpose of delay.'"

To the same effect:

> New Orleans Water Works Co. v. Louisiana, 185 U. S., 336;
> Sawyer v. Piper, 189 U. S., 154.

B.

In Lloyd v. Matthews, 155 U. S., 222, 228, this Court says:

> "This record contains nothing to show as matter of fact that the public acts of Ohio had by law or usage in Ohio any other effect than given them by the Court of Appeals of Kentucky."

In the case at bar there is certainly nothing to show as matter of fact that the Constitution of Ohio had by law or usage in Ohio any other effect than is given to it by the Court of Appeals of New York. On the other hand, decisions of the Supreme Court of Ohio were admitted in evidence and considered by the New York Courts, at least tending to show that if the statute here questioned had been before the Supreme Court of Ohio, it would have been declared constitutional (Rec., pp. 26, 42, 50).

In Ohio, acts have been held unconstitutional as special acts, where their provisions were limited to a class consisting at the time of only one individual, and the acts contained no provision by which other individuals might at any time come under them. As, for instance, acts relating to cities having a certain population according to a particular census, applying only to one city, and containing no provision that other cities reaching that population under subsequent censuses should be covered by the acts. But classification not thus restricted has been repeatedly held constitutional by the Ohio Courts.

In State v. Turnpike Co., 37 Ohio St., 481, 484, the Supreme Court of Ohio held that a classification of turnpike companies was not unreasonable or arbitrary, and as the act had a uniform operation upon the individuals of each class, it was not unconstitutional.

In Bronson v. Oberlin, 41 Ohio St., 476, an act authorizing incorporated villages containing a college or university to regulate the traffic of liquor, was held constitutional, the Court, at page 481, saying:

> "The principle seems to be that a law which relates to certain municipal corporations as a class and having a like effect upon all within the class, is general, but one which relates to a particular municipality of a class, is special."

In Platt v. Craig, 66 Ohio St., 75, the Court, at page 77, referring to Section 26, Article 2, and Sections 1 and 6, Article 13, of the Constitution of Ohio, says:

> "We will not undertake to reconcile all of the reported decisions of this court concern-

ing these provisions of the constitution, which are involved";

and at page 78:

"It would seem to be clear, therefore, that a special act, as opposed to an act of a general nature, is one that is local and temporary in its operation (State v. Hoffman, 35 Ohio St., 433, 443)."

At page 79:

"Laws of a general nature are required by the constitution (art. 2, sec. 26) to have a uniform operation throughout the state. Not only must such laws operate throughout the state, but they must operate uniformly, that is, there must be no exemption *as to individuals of the same class.* A general law must, therefore, in its operation be coextensive with the state and *coextensive with every class brought within the purview of the statute;* but the section does not imply that a law of a general nature must necessarily affect every individual in the state, or every small division of territory within the state."

In State *ex rel.* v. Speilmire, 67 Ohio St., 77, at page 86, BURKET, C. J., says: "With us 'uniform operation throughout the state' means universal operation as to territory; it takes in the whole state. And, as to persons and things, it means universal operation to all persons and things *in the same condition or category.* When a law is available in every part of the state *as to all persons and things in the same condition or category,* it is of uniform operation throughout the state."

In State v. Sherman, 22 Ohio St., 411, the Supreme Court of Ohio, in construing 60 O. L., 54 (Rec., p. 23), says, at pages 429, 430:

"We have no hesitation in holding that the

act of 1863 is not liable to the objection that it is a 'special act.' It is a 'general law' in our judgment, within the meaning of article 1, section 2, of the constitution. In so holding, we merely repeat in substance what has been heretofore decided by this court in Cricket v. State, 18 Ohio St. 9; Welker v. Potter, 18 Ohio St., 87."

In Gentsch v. State *ex rel.* McGorray, 71 Ohio St., 151, the Supreme Court of Ohio was called to pass upon the constitutionality of an Act of the General Assembly passed April 23, 1904, which included a certain section, to wit, Section 2926-o, which provides that on the day of the November election in every year the polls in each and every precinct in cities in which registration is required shall be opened by the judges of election, appointed and organized as is provided in said Act, by proclamation made by the chairman, at the hour of 5:30 o'clock in the morning, standard time, and shall be closed by proclamation, at the hour of four o'clock, standard time, in the afternoon, in cities which now have or which may hereafter have a population of 300,000 or more, as ascertained in the manner provided in Section 2926-a, and at the hour of 5:30 o'clock in the afternoon in all other cities in which registration is required. The Court held this act constitutional, and its language at pages 163-167 is significant.

Among other things, it says:

"The legislature therefore provided that the polls should be closed at four o'clock, standard time, in the afternoon, 'in cities which have now or may hereafter have a population of three hundred thousand or more.' The minimum of population thus fixed is tens of thousands below the population of either of the

> cities now included within the class, and is not beyond the range of possibility to other cities, if the rate of growth in urban populations in recent years should continue for a quarter or a half of a century. Thus the legislature clearly evinced an intention that the section which is now challenged should not apply to Cincinnati and Cleveland only, but should apply generally throughout the state, and that it should be a permanent regulation regarding the conduct of elections throughout the state."

In *Cincinnati Street Railway Co. v. Horstman*, 72 Ohio St., 93, the Supreme Court of Ohio declared constitutional 92 O. L., 277 (printed as an appendix to this brief, p. 34). The discussion of the question is found at pages 104-111 of the opinion. At page 109 this language is used:

> "For the reasons stated we approve as the fair result of all the cases the statement of the law which is made in *State ex rel.* v. *Parsons, et al.*, 40 N. J. Law, 123, as follows: 'A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law.' "

The classification of the Act of 1902 is proper and not dissimilar to the classifications of 60 O. L., 54, and 92 O. L., 277.

Under the 14th Amendment while the power of a State Legislature to select certain individuals for the operation of a statute, is not an arbitrary one, yet there is a power of selection and a right to the exercise of judgment. "In short, the selection, in order to become obnoxious to the Fourteenth

Amendment, must be arbitrary and unreasonable, not merely possibly, but clearly and actually so."

Bachtel v. Wilson, 204 U. S., 36, 41.

C.

Where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has also been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment.

Jenkins v. Loewenthal, 110 U. S., 222;
Crescent City Live-Stock Co. v. Butchers' Union, 120 U. S., 141, 156, 157;
Eustis v. Bolles, 150 U. S., 361;
Hammond v. Conn. Life Ins. Co., 150 U. S., 633;
Missouri Pacific Ry. Co. v. Fitzgerald, 160 U. S., 556;
Harrison v. Morton, 171 U. S. 38;
Leathe v. Thomas, 207 U. S., 93;
Arkansas Southern R. R. Co. v. Sherman Natl. Bank, 207 U. S., 270;
Vandalia R. R. Co. v. Indiana *ex rel.* The City of South Bend, 207 U. S., 359;
Elder v. Wood, 208 U. S., 226, 233.

It appears from the opinion of Mr. Justice DOWLING, the Trial Judge, Record p. 36, that he did not pass upon the validity of the act of the Ohio Legislature, on the ground that if the act was repugnant to the Constitution of that State, the

proper forum in which to test that question was an Ohio tribunal.

In the opinion of the Appellate Division (Rec., p. 37), the incorporation of The Andrews Institute and its organization and accepting of the gift under the Will are treated as matters of fact.

In that opinion (Rec., pp. 41, 42) the Act of 1902 is referred to, and the question whether it was valid or not is treated as a question of general law, and an Ohio decision is cited, no reference being made to the Constitution of the United States, nor is there anything in the opinion to indicate that the attention of the Court had ever been called to a Federal question.

It appears (Rec., p. 42) that the Court was of opinion that the corporation could be sustained under other statutes of the State of Ohio, and further, on the same page it appears that the Court was controlled also by the fact that the corporation had been recognized by the State of Ohio and no proceeding had been taken there to have its charter either annulled or forfeited. The learned Judge also says: "While I think The Andrews Institute was legally incorporated, it is at least a *de facto* corporation acting under color of law and apparently recognized by the State under whose laws it has sprung into existence, and with little likelihood of its corporate existence being drawn in question."

In this connection it may be stated that Section 3238 of the Ohio Statutes (Rec., p. 9) makes a copy of the articles of incorporation certified by the Secretary of State *prima facie* evidence of the existence of the corporation, and that on page 12 of the Agreed Record appears the certificate of the Secre

tary of State of Ohio to the articles of incorporation of The Andrews Institute for Girls.

In the opinion of the Court of Appeals (Rec., p. 45) is the statement that "the judgment rendered herein at Special Term has been unanimously affirmed by the Appellate Division, and there is no contention in this Court about the facts as found at the Special Term."

Indeed, under the New York Code of Civil Procedure, the Court of Appeals was bound by the findings of the Special Term, Sec. 191, Subd. 4, providing that "no unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the Court, shall be reviewed by the Court of Appeals."

Foreign law is a question of fact, and when a finding thereon has been unanimously affirmed, it is conclusive on the Court of Appeals.

> Genet v. Del. & Hud. Canal Co., 163 N. Y., 173, 177;
> Spies v. Nat. City Bank, 174 N. Y., 222, 227.

On page 47 of the record, the fact of the organization of The Andrews Institute under the laws of the State of Ohio is referred to, and it is also stated that it had been found to have capacity under the laws of the State of Ohio to take the gift under the Will of the deceased, and that the clauses of the Will in question were valid under the laws of the State of Ohio; and on page 48 this language is used: "Although it has been found as a fact in this case that the fourth, fifth and sixth clauses of the Will of the testator are valid under the laws of the

State of Ohio, and that the corporation as formed in that State has capacity to take the gift under said clauses of the Will, we will briefly refer to the law of this State which in our judgment sustains such gift."

It also appears in the record (bottom of p. 50, top of p. 51) that the Court regarded the formation of The Andrews Institute for Girls as a question of fact.

Again, on page 57, is this language: "The Smithsonian Institution is not a residuary legatee. The gift to it is an alternative gift dependent upon the gift to the Andrews Institute for Girls failing because of illegality or because the intention of the testator with respect to said institution became impossible of realization. The proposed incorporation is not and never was illegal. It could not, therefore, fail for illegality. Neither was it ever *impossible* of realization."

The Court of Appeals, therefore, could and evidently did regard the question as a question of fact, and as foreclosed by the action of the Special Term unanimously affirmed by the Appellate Division. It, however, thought proper to consider the law applicable to the situation.

At pages 50, 51, of the record, the Court of Appeals discusses the laws of Ohio applicable to the formation of this corporation and is evidently of opinion that it could have been formed under the general laws in existence at the time of the death of the testator; and it only takes up the Act of 1902 upon the *assumption* that it was passed to aid in the incorporation of The Andrews Institute for Girls.

See Sections 3235, 3236, 3238, 3239 of the Ohio

Statutes (Rec., pp. 8, 9); 53 O. L., p. 33, applying to endowments theretofore created, as well as to those thereafter created (Rec., pp. 21-23); Sections 3726, 3727, 3733 (Rec., pp. 24, 25).

The Court then discusses the question whether the Act of 1902 is a special Act under the New York decisions, and also whether it is a special Act and a violation of the Constitution of Ohio under the decisions of the Courts of that State.

Nowhere is there any reference to the Constitution of the United States or anything to indicate that the attention of the Court had at any time been called to any Federal question.

There is nothing in the answer of the plaintiffs-in-error to draw attention to the Constitution of the United States. On the other hand (Rec., p. 13), reliance is placed exclusively upon its being a special Act within the meaning of the Constitution of Ohio.

In Eastern Building, &c., Ass'n v. Williamson, 189 U. S., 122, 126, 127, this Court says:

"While statutes and decisions of other states are facts to be proved, yet when proved their construction and meaning are for the consideration and judgment of the Courts in which they have been proved."

In Stickney v. Kelsey, Comptroller, etc., 209 U. S., 419, it is held (headnote):

> "That where the language of the appellate court is ambiguous, if it may be taken as a declination to pass upon a question not necessary to the decision, this court will not, in order to aid a technical and non-meritorious defense, spell out a Federal question; but it will resolve the ambiguity against the plaintiff in

> error, who is bound, in order to give this court jurisdiction, to clearly show that a Federal right has been impaired."

In Blount v. Walker, 134 U. S., 607, it is held that to give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

This Court on error to a State Court cannot consider an alleged federal question when it has not been by adequate specification called to the attention of the State Court, and has not been by it considered, not being necessarily involved in the determination of the case.

> Capital City Dairy Co. v. Ohio, 183 U. S., 238, 248.

San Francisco v. Itsell, 133 U. S., 65, holds that this Court has no jurisdiction to review a judgment of the highest Court of a State, unless a federal question has been, either in express terms or by necessary effect decided by that Court against the plaintiff-in-error.

Followed in *Chappell* v. *Stewart*, 169 U. S., 733; *Jones* v. *Vane*, 200 U. S., 614, and *Field* v. *Barber Asphalt Paving Co.*, 209 U. S., 540.

The Court of Appeals will not consider a constitutional question unless it was raised in a proper manner in the Courts below, it being held to be waived.

> Dodge v. Cornelius, 168 N. Y., 242, 244, 245;

Paul v. Del., Lack. & W. R. R. Co., 175 N. Y., 478;
Matter of Andrews, 178 N. Y., 416, 420;
N. Y. Bank Note Co. v. Hamilton Bank Note, &c., Co., 180 N. Y., 280, 293.

And see Purdy v. Erie R. R. Co., 162 N. Y., 42, 50, 51, approved by this Court in Erie R. R. Co. v. Purdy, 185 U. S., 148, 153, 154.

Exceptions in the lower Courts must be specific and not general.

Colby v. Town of Day, 177 N. Y., 548, 549.

POINT TWO.

Assuming that a federal question was involved in this case, no federal question was raised by plaintiffs-in-error prior to their motion for a reargument; and as the federal question was not considered and acted upon by the Court of Appeals upon that motion, the raising of the federal question came too late.

McMillan v. Ferrum Mining Co., 197 U. S., 343.
Disconto Gesellschaft v. Umbreit, 208 U. S., 570.
Paraiso v. United States, 207 U. S., 368.
Harding v. Illinois, 196 U. S., 78, 84, 86, 87.

Inasmuch as plaintiffs-in-error relied in this case upon the full faith and credit clause of the consti-

tution of the United States, their claim must be "specially set up and claimed" by them.

Johnson v. New York Life Insurance Co., 187 U. S., 491, 495.
Columbia Water Power Co. v. Columbia Elect. St. Ry. Co., 172 U. S., 475, 488, and cases cited.

"It must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here, the decision must be against the right so *set up or claimed.* * * * If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned."

Spies v. Illinois, 123 U. S., 131, 181.

It has been held, when in a State Court a *judgment* of another State is relied upon, it is not necessary in terms to refer to the Federal Constitution in order to raise a Federal question. This, of course, is held because, if the judgment of a Court of another State is relied upon, the question of giving it full faith and credit, as provided by the Constitution of the United States, is *directly and necessarily* involved.

This principle does not apply to the question what force shall be given by a State Court to a statute or a constitutional provision of another State, for the reason, among others, that a question of construction may be involved, while admitting the validity of the act or the constitutional provision, and, in such cases, therefore, it is necessary to show that the validity of the statute or constitutional provision were denied, and that

plaintiff-in-error made it appear to the Court below that he relied upon the provisions of the Constitution of the United States as to full faith and credit. Nowhere in the case at bar was there any mention of the Constitution of the United States until the petition for a re-argument; nor is there anything in the record from which it could reasonably be inferred that the plaintiff-in-error relied upon anything other than the Constitution of the State of Ohio.

In Thomas v. State of Iowa, 209 U. S., 258, it is held that, in order to give this Court jurisdiction to review the judgment of a State Court, the Federal question must be distinctly raised in the State Court, and a mere claim which amounts to no more than a vague and inferential suggestion that a right under the Constitution of the United States has been denied, is not sufficient.

In Chicago, Indianapolis & Louisville Ry. Co. v. McGuire, 196 U. S., 128, it is held that, where certain facts from which a Federal question might arise, were argued in the State Court, but their Federal character was not indicated, they cannot be made the basis of a writ of error. This case was followed by Skaneateles Paper Co. v. City of Syracuse, 201 U. S., 642, which cites Scudder v. Comptroller of New York, 175 U. S., 32, and Eastern Building, &c., Assn. v. Welling, 181 U. S., 47, and by Stewart v. Louisiana, 207 U. S., 584, citing other cases.

To the same effect, Jacobi v. Alabama, 187 U. S., 133.

In Scudder v. Comptroller of New York, 175 U. S., 32, it appears, at page 35, that among the assignments of error in this Court, references were made to the Fifth and Fourteenth Amendments to

the Constitution of the United States, and the Court says:

> "But the difficulty which lies at the threshold of the consideration of this writ of error is that none of the points taken in the assignment of errors appear by the record to have been made in any of the courts of the state."

It appeared that in the objections in the Court below, it was claimed "that said deposit is exempt under the laws and not subject to taxation," and that the deposit was a chose in action belonging to a non-resident, and not property within the State of New York subject to taxation; that the situs of the claim was that of the domicile of the decedent, and "such property being the property of a non-resident decedent, and situated out of this state, the same does not fall within the purview of said Act."

On page 36, this Court says:

> "Both these statements clearly refer to the laws of New York, and not to the Constitution of the United States. And the opinion of the Supreme Court, as well as that of the Court of Appeals, turns upon the question whether the sum due from the Farmers' Loan and Trust Company of the city of New York to the intestate at the time of his death was 'property within the State', within the meaning of the statute of 1892.
>
> No mention of the Constitution of the United States, or any provision thereof, by the plaintiff in error, or by the court, is to be found at any stage of the case while it was pending in the courts of the State of New York; and it is impossible, upon this record, to avoid the conclusion that it never occurred to the plaintiff in error to raise a Federal question until after the case had been finally decided against him in the highest court of the State.

In order to give this court jurisdiction of a writ of error to review a judgment which the highest court of a State has rendered in favor of the validity of a statute of or an authority exercised under a State, the validity of the statute or authority must have been 'drawn in question' 'on the ground of their being repugnant to the Constitution, laws or treaties of the United States.' When no such ground has been presented to or considered by the courts of the State, it cannot be said that those courts have disregarded the Constitution of the United States, and this court has no jurisdiction. Rev. Stat., Sec. 709; *Murdock* v. *Memphis*, 20 Wall., 590, 633, 634; *Levy* v. *Superior Court of San Fransisco*, 167 U. S., 175; *Miller* v. *Cornwall Railroad*, 168 U. S., 131; *Columbia Water Power Co.* v. *Columbia Railway*, 172 U. S., 475, 488, and cases there cited.

Writ of error dismissed for want of jurisdiction."

In *Oxley Stave Company* v. *Butler County*, 166 U. S., 648, this Court at page 653 says:

"This court may reexamine the final judgment of the highest court of a State when the validity of a treaty or statute of or an authority exercised under the United States is 'drawn in question' and the decision is against its validity, or when the validity of a statute of or an authority exercised under any State is 'drawn in question' on the ground of repugnancy to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. But it cannot review such final judgment, even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was 'specially set up or claimed' in the state court as belonging to such party, under the

Constitution or some treaty, statute, commission or authority of the United States (Rev. Stat., Sec. 709).

"Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

See, also, pages 654, 655.

The Court in that case discusses the previous cases on this point.

To the same effect:

Capital City Dairy Co. v. Ohio, 183 U. S., 238, 248.

In *Osborne* v. *Clark*, 204 U. S., 565, 568, this Court says:

"But the plaintiffs-in-error say further that the question of their rights under the Constitution of the United States necessarily was involved in a decision upon the bill, and that that is enough when the validity of a state law is concerned (*Columbia Water Power Co.* v. *Columbia Electric Street Ry., Light & Power Co.*, 172 U. S., 475, 488; *McCullough v. Virginia*, 172 U. S., 102, 117). These and similar cases, however, are not to be pressed to the point that, whenever it appears that the state law logically might have been assailed as invalid under the Constitution of the United States, upon grounds more or less similar to those actually taken, the question is open. If

> a case is carried through the state courts upon arguments drawn from the state constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States (*Crowell* v. *Randall*, 10 Pet., 367, 398; *Simmerman* v. *Nebraska*, 116 U. S., 54; *Hagar* v. *California*, 154 U. S., 639; *Erie Railroad* v. *Purdy*, 185 U. S., 148, 153)."

In N. Y. Central & H. R. R. R. Co. v. New York, 186 U. S., 269, 273, this language is used: "It is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, constitution was relied upon, and that such provision must be set forth," citing various cases.

A.

Banholzer v. N. Y. Life Ins. Co., 178 U. S., 402, and Eastern Bldg. Assn. v. Welling, 181 U. S., 47, are practically identical with the case at bar, and are conclusive that the writ of error herein should be dismissed. In the former case the syllabus is:

> "This case is dismissed for want of jurisdiction, as the Supreme Court of Minnesota did not deny the validity of the New York statute with regard to insurance, but only construed it; and, even granting that its construction was erroneous, faith and credit were not denied to the statute."

At page 408 of that case, this Court says:

> "The plaintiff-in-error, however, assails the conclusion of the court. It asserts the court erred in its construction of the Conway case, and erred in its independent construction of the New York stat-

ute. Granting, *arguendo,* the correctness of both assertions, the validity of the statute was not denied. Its validity and authority were declared and its meaning was first sought in a decision of the New York courts, and then confirmed by an independent case and construction. We think, therefore, that the cases of Glenn v. Garth, and Lloyd v. Matthews, *supra,* apply and on their authority the action should be dismissed for want of jurisdiction."

In the Eastern Build. Ass'n case, several federal questions were asserted, among other things, that the Supreme Court of South Carolina, by its decision, refused full faith and credit to public acts of the State of New York. This Court at pages 48 and 49 says:

"While in various forms, in the trial court, the association in effect claimed that the law of its incorporation formed a part and parcel of the mortgage contract, and that the decisions of the courts of New York respecting the powers and contracts of associations thus incorporated should be given effect, nowhere does it appear that it was claimed that to refuse to concur in the view stated would operate to deny the protection of the Constitution of the United States. The trial court disposed of the case solely upon what it regarded as the plain import of the terms of the contract, irrespective of the laws of New York and the decisions of the New York Courts, yet in the numerous exceptions predicated on the rulings of that court there was not contained, either directly or indirectly, any contention that rights of the association protected by the Constitution of the United States had been invaded. It was not until after the Supreme Court of South Carolina construed the mortgage contract in accord with the claim of the

plaintiffs, and that court had hence affirmed the judgment of the trial court and remitted the cause to that court, that, in an application for a rehearing, numerous grounds were set forth in which were contained assertions that the adverse decision of the Supreme Court of the State was in conflict with several clauses of the Constitution of the United States. But this came too late.

* * * * * *

The assertion that although no Federal question was raised below, and although the mind of the state court was not directed to the fact that a right protected by the Constitution of the United States was relied upon, nevertheless it is our duty to look into the record and determine whether the existence of such a claim was not necessarily involved, is demonstrated to be unsound by a concluded line of authority. * * *

The error involved in the argument arises from failing to observe that the particular character of Federal right which is here asserted is embraced within those which the statute requires to be 'specially set up or claimed.' The confusion of thought involved in the proposition relied upon is very clearly pointed out in the authorities to which we have referred, and especially in the latest case cited, *Columbia Water Power Co.* v. *Columbia Street Railway Co., supra.*"

POINT THREE.

Although the record in this case may show that this Court has jurisdiction in the premises, yet it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument; and it is manifest that the writ of error was taken for delay only.

This point is sufficiently supported by the authorities and considerations already adduced, but a few words may be added.

Plaintiffs-in-error seem to contend that the copying of the Will into the articles of incorporation, if considered as a restriction on the powers of the corporation, makes the Act of 1902 a special one. In other words, the character of the act is determined by something done under it. If this were so, there could be no general act of incorporation unless it prescribed the same form and the same powers for all companies organized under it. No argument is needed to refute these propositions.

But if the State Courts made a mistake in this respect, it was a mistake of construction, and involved no Federal question.

The theory of the plaintiffs-in-error comes to this: Every time a State Court fails to adopt the construction which a party gives to the Constitution of another State, the State Court fails to give full faith and credit to such Constitution.

If the incorporation of The Andrews Institute for Girls were declared invalid it would not help the plaintiffs-in-error. There can be no question but that the testator's intention could

have been carried out by incorporation under the general corporation law of Ohio in force at his death, save possibly in respect to the directors be desired to have the management of the school. But the direction as to these was not imperative. The language is (Rec., p. 7): *"if and so far as may be consistent with law and practicable."* Mr. St. John is still alive. If he neglected to proceed, it would be the duty of the Attorney-General of New York to apply to the Supreme Court of that State under Chapter 701 of the Laws of 1893, which provides in Section 1, among other things, that no bequest or devise to educational or charitable uses shall be or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries, and that if no person be named as Trustee the title to the property shall vest in the Supreme Court; and in Section 2 that the Supreme Court shall have control over bequests and devises in all cases provided for by Section 1, and that "The Attorney General shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the Court."

Section 2 was amended by Chapter 291, Laws of 1901, but not so as to affect the power of the Supreme Court or the duty of the Attorney-General.

Respectfully submitted,

JAMES W. HAWES,
Attorney and of Counsel for
Defendant-in-Error St. John,
as Executor, &c.

APPENDIX.

92 O. L., 277.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That section 2505a, as enacted May 1, 1891, and section 2505b, as amended April 18, 1892, of the Revised Statutes of Ohio, be amended, and that section 2505d be enacted as supplementary thereto, as herein set forth:

SEC. 2505a. Any corporation or company organized for street railway purposes may lease or purchase any street railroad or street railroads, or railroad operated as a street railroad, by electric, cable or other rapid transit motive power, or inclined plane railroad or railroads, together with all the property, real, personal and mixed, and all the franchises, rights and privileges respecting the use and operation of such railroad or railroads, situated or existing in whole, or in part, within this state, constructed and held by any other corporation or company, corporations or companies, the latter being hereby vested with corresponding power to let or sell, upon such terms and conditions as may be agreed upon between the corporations or companies; and any two or more of such corporations or companies may enter into any arrangement for their common benefit consistent with and calculated to promote the objects for which they were created. No such lease or purchase shall be perfected until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty (30) days' notice to each stockholder, at such time and place, and in such manner as is provided for annual meet-

ings of the companies, and the holders of at least two-thirds of the stock of each company in person or by proxy at such meeting, or at any properly adjourned meeting, assent thereto. Provided, that any stockholder who refuses to assent to such lease or sale, and signifies the same by notice in writing to the lessee or purchaser within ninety (90) days thereafter, shall be entitled to demand and receive compensation in the manner provided for the compensation of stockholders in sections 3302, 3303 and 3304, of the Revised Statutes; and the said sections are adopted and made to be part of this section. And any such corporation or company may purchase and own all or any part of the capital stock of any such corporation or company in this or adjoining states, whose lines or authorized lines of road intersect or connect, with the route or lines of the corporation or company making such purchases.

SEC. 2505b. Whenever the lines or authorized lines of road of any street railroad corporations or companies meet or intersect, or whenever any such line of any street railroad corporation or company, and that of any inclined plane railway or railroad company or corporation or any railroad operated by electricity or other means of rapid transit may be conveniently connected, to be operated to mutual advantage, such corporations or companies, or any two or more of them, are hereby authorized to consolidate themselves into a single corporation; or whenever a line of road of any street railroad company or corporation organized in this state is made or is in process of construction to the boundary line of the state, or to any point either within or without the state, such corporation or company

may consolidate its capital stock with the capital stock of any corporation or company, or corporations or companies in an adjoining state, the line or lines of whose road or roads have been made or are in process of construction to the same point or points, in the same manner and with the same effect as provided for the consolidation of railroad companies in sections 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391 and 3392 of the Revised Statutes, and any and all acts amendatory and supplementary to said sections and each of them; and the said sections, including these so amended and supplemented, are adopted and made a part of this section.

SEC. 2505d. Whenever it is proposed to bring any two or more lines of road within the control or ownership of one corporation or company under and in pursuance of either section 2505a and 2505b, which roads are held and operated under grants providing different terms and conditions, it shall be competent for the board of administration in any city of the first grade of the first class, and for the council or other legislative body of any other municipal corporation to agree with the corporation or company so acquiring control or ownership, that such terms and conditions shall be and remain unchanged as they are contained in each of the grants under which said several lines of road are operated, on condition that said railroad company or companies shall provide or extend a system for transferring passengers from line to line going in the same general direction, and such other transfers as shall be satisfactory to said board of administration, or council or other legislative body; and provided further, that no fare for children will be charged upon any of said

routes in excess of the minimum fare for children over either of such separate routes prior to such consolidation or purchase; and provided further that for a continuous ride in the same general direction over the lines of such consolidated company within any municipal corporation no fare greater than five cents shall be charged; or in lieu of the foregoing, it shall be competent in all such cases for the board of administration in any city of the first grade of the first class, and for the council or other legislative body of any other municipal corporaion to extend the time of each of said grants or franchises for such periods as together with the unexpired term of such existing grant or franchises shall not exceed the period of fifty years from and after the passage of this act; provided, the company so acquiring control and ownership of said roads will agree to such changes and modifications in the existing terms and conditions of said grants or franchises, including motive power, extensions, changes and revision of routes, and including also the above mentioned rates of fare for children, and transfer system, and such other changes as to rates of fare and transfers as will make the terms and conditions applicable to all said roads or lines satisfactory to said board of administration or legislative body; and provided further, that no increase of fare shall be allowed in any case, and no decrease shall be allowed in any case of car license fees or percentage tax on gross earnings now required to be paid. And provided further that the municipal corporation in which such street railroad is situated shall have the power at the end of twenty years from the passage of this act and every fifteen years thereafter to fix the rates of fare, car license fees, per-

centage tax on gross earnings, transfers and all other terms and conditions on which such railroad is operated in said city. The said terms shall be fixed by the board of administration if there be such a board, and if there be none then by the common council or legislative body of the municipal corporation, and must be approved and confirmed in the manner which at the time may be required for other acts of such municipal corporation. Notice of the time and place when such rates and regulations shall be fixed shall be given by public notice in two daily newspapers of general circulation in such city and the hearing on the same shall be open and public, and the terms there fixed shall be equitable according to the then cost of carrying passengers. Should the parties not agree as to whether said terms are equitable, the same may be submitted to the adjudication of a court of competent jurisdiction in a suit brought by the company to enjoin the municipal corporations from enforcing the terms so fixed.

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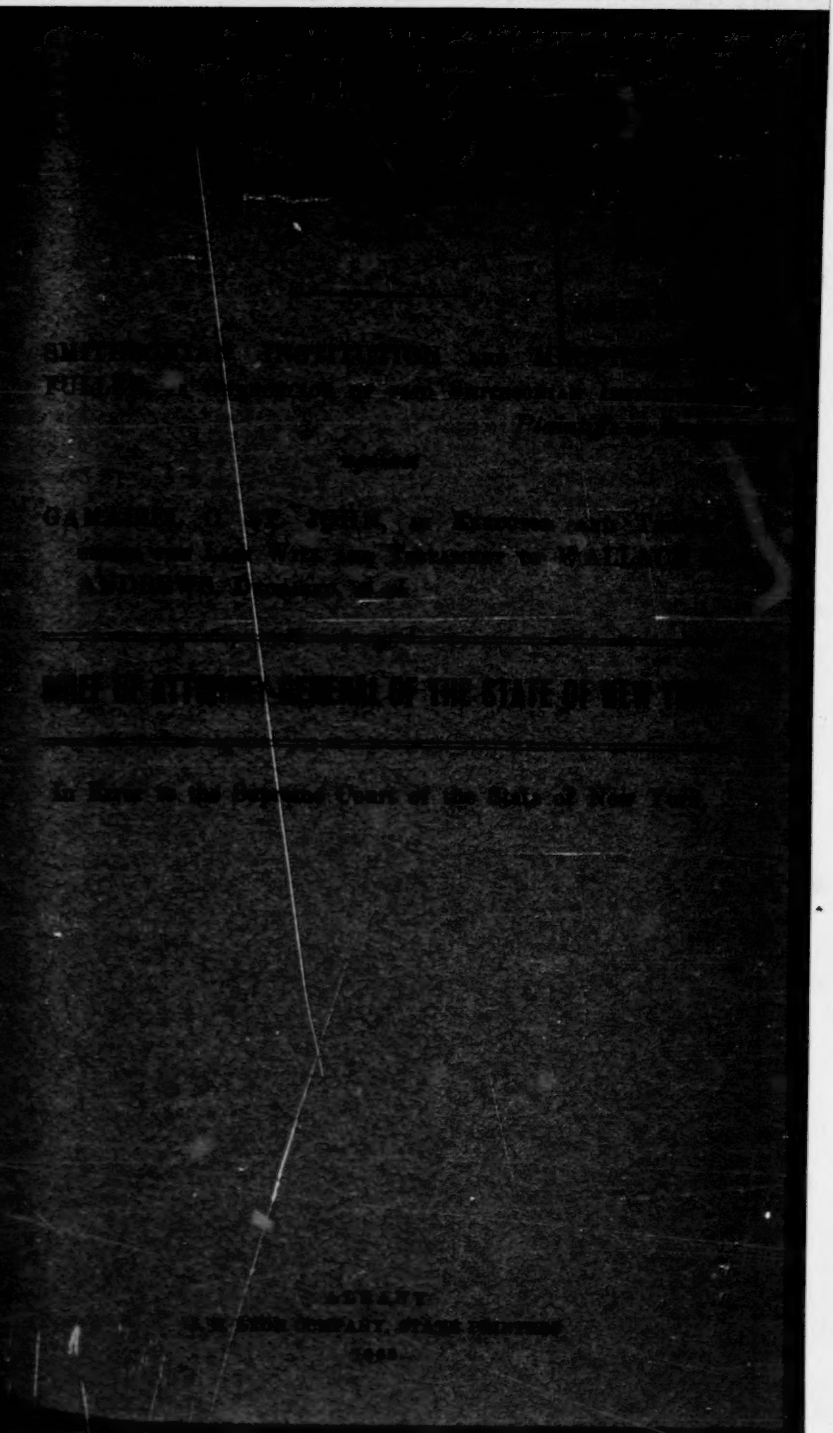

In the Supreme Court of the United States.

SMITHSONIAN INSTITUTION and MELVILLE W. FULLER, as Chancellor of said Smithsonian Institution,

Plaintiffs-in-Error,

vs.

GAMALIEL C. ST. JOHN, as Executor and Trustee under the Last Will and Testament of Wallace C. Andrews, deceased, *et al.*

Brief of the Attorney-General of the State of New York.

Statement.

The action below was commenced in the Supreme Court of the State of New York by Gamaliel C. St. John, as Executor and Trustee under the last Will and Testament of Wallace C. Andrews, deceased, for the construction of said Will and the determination of the rights of the parties thereunto, against The Andrews Institute for Girls; the Smithsonian Institution and Melville W. Fuller, as Chancellor of the Smithsonian Institution; the Attorney-General of the State

tion could not be formed after the death of the trustee. That, however, is merely academic at this time.

It is respectfully submitted that this court should affirm the judgment herein.

EDWARD R. O'MALLEY,
Attorney-General of the
State of New York,
Defendant-in-Error.

Supreme Court of the United States.

SMITHSONIAN INSTITUTION and another, Plaintiffs-in-Error, v. GAMALIEL C. ST. JOHN, as Executor, &c., and others, Defendants-in-Error.	No. 613. October Term, 1908.

Brief for Defendant-in-Error G. C. St. John, as Executor, &c.

The briefs of defendants-in-error on the motion to dismiss or affirm are before the Court, and are relied on upon this hearing.

In addition to what is contained therein, reference may be made to the very recent case of Waters-Pierce Oil Co. v. Texas (No. 2), 212 U. S., 112, which holds that the assignment of errors in the Federal Supreme Court cannot raise a federal question reviewable on writ of error to a State Court, but such review is confined to the assignments of error made and passed upon in the judgment brought up for review (pp. 115, 116).

That an attempt to assign new errors in a petition for a rehearing in a State Court which is overruled without an opinion passing on the federal questions, cannot avail to import such questions

into the record, so as to sustain a writ of error from the Federal Supreme Court to the State Court (p. 118). (This is also held in McCorquodale v. Texas, 211 U. S., 432).

That the Federal Supreme Court will not review a judgment of a State Court where the latter has decided the case upon an independent ground not within the federal objections taken, and that ground is sufficient to maintain the judgment (pp. 116, 117).

The last point is also ruled in Waters-Pierce Oil Co. v. Texas (No.1), 212 U. S., 86, 106; and Berea College v. Kentucky, 211 U. S., 45, 53.

In their Appendix Brief on the motion to dismiss or affirm, plaintiffs-in-error say:

> "That the question, standing by itself, whether the Andrews Institute be or not the corporation which the testator had in mind, is exclusively for the New York Court to decide, we freely admit. We further concede that ordinarily the decision of that question would not involve an inquiry under the Constitution of the United States. We say 'ordinarily,' because it is an unusual thing for such a question to admit of a right, title or privilege to be set up under the Constitution of the United States" (p. 8).

> "We are met with the criticism that the question whether the copying of a will into the articles makes the restrictions of the will operative as a charter restriction, is not a Federal question. We do not contend that it is. But we say that the moment the New York Court decides that such copying does make the restrictions operative, it must perforce take another step and decide that the Ohio Constitution does not forbid the creation of such a corporation" (p. 14).

"It may be argued that the State Court in deciding that the corporation formed under the statute of 1902 was the corporation meant by Mr. Andrews—was deciding a non-Federal question. True, the question as to the character of the corporation is a non-Federal question, but in order to determine it the court had first to enquire what effect the Ohio Constitution has upon that clause of the statute of 1902 which provides that the will shall be copied into the articles of incorporation" (p. 16).

"This last-named step has to be taken; nor is it a valid objection that it follows other steps. It will be seen that these successive steps are logically connected one with the other; and that it is of no consequence that the particular step as to which our appeal to the Federal Constitution lies is not the first in the series, so long as it clearly appears to be one that the court must have taken before it could have decided as it has" (p. 16).

It is thus through a series of steps or inferences that they reach a Federal question. Such question on their own admission was not obvious. It was therefore necessary for them to call the attention of the State Courts specifically to the Federal Constitution.

MERITS.

I.

AN ACT OF THE LEGISLATURE IS NOT TO BE DECLARED INVALID UNLESS IT IS CLEARLY AND UNEQUIVOCALLY IN CONFLICT WITH THE CONSTITUTION. THE UNCONSTITUTIONALITY MUST BE FREE FROM ANY REASONABLE DOUBT.

Groesch v. State, 42 Ind., 547, 554, 555; Vermont Loan & Trust Co. v. Whithed, 2 N. Dak.,82, 92; Nicol v. Ames, 173 U. S., 509, 514, 515; Sage v. City of Brooklyn, 89 N. Y., 189, 196.

In Matter of N. Y. El. R. R. Co., 70 N. Y., 327, the Court at pages 342 and 343 uses the following language:

> "There are several grave constitutional objections raised to the General Rapid-Transit Act which must first be considered. In considering them we must keep in view the salutary rule often reiterated that nothing but a clear violation of the Constitution will justify a Court in overruling the legislative will. Every statute is presumed to be constitutional and every intendment is in favor of its validity. When a statute is challenged as in conflict with the fundamental law, a clear and substantial conflict must be found to exist to justify its condemnation. * * *

1. Mr. Justice WASHINGTON, in Ogden v. Saunders (12 Wheat., 270), said: 'It is but a decent respect to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt.'"

Similar language is used in Matter of Gilbert El. Ry. Co., 70 N. Y., 361, at pages 367 and 368:

> "Every presumption is in favor of the constitutionality of acts of the Legislature. An adverse doubtful construction is not sufficient to condemn an act. It is only in cases of a clear and substantial departure from the provisions of the fundamental law that the courts will declare acts of the Legislature invalid (55 N. Y., 54; 50 *id.*, 553; 14 Mass., 340; 17 N. Y., 235; 23 Wend., 166).
>
> There is a distinction in this respect between the State and Federal constitution. The former grants to the Senate and Assembly, all legislative power not prohibited by the latter, or excepted by the instrument itself; the latter grants to Congress specific powers only. Hence, the exercise of a legislative power by the State Legislature will be presumed constitutional under the general grant of power, and will be sustained unless brought clearly within some of the exceptions, while a similar exercise of power by Congress can only be justified by an affirmative grant embracing the specific power exercised."

In People v. Budd, 117 N. Y., 1, 13, the Court refers to "the settled rule that only when required by the most cogent reasons, nor, indeed, unless compelled by unanswerable grounds, will a court declare a statute to be unconstitutional. 'On more than one occasion,' said Chief Justice MARSHALL in Dartmouth College v. Woodward (4 Wheat., 625), 'this Court has expressed the cautious circumspection with which it approaches the consideration of such cases, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution.' "

When the courts of a state have before them a

statute or constitutional provision of another state and its meaning is fairly the subject of argument, the question is a judicial one, and this Court has no jurisdiction, although the State Court has decided it wrongly. This is true not only when there are no previous decisions on the subject, but also where there are conflicting decisions in the home state or in other states.

II.

IF THERE IS ROOM FOR TWO CONSTRUCTIONS OF AN ACT, THAT MUST BE ADOPTED WHICH WILL MAKE IT CONSTITUTIONAL.

Grenada Co. Supervisors vs. Brogden, 112 U. S., 261, 268, 269; Matter of N. Y. & L. I. Bridge Co., 148 N. Y., 540, 55[illegible]; Kittinger v. Buffalo Traction Co., 160 N. Y., 377, 394.

If to hold that the Act of 1902 (Rec., pp. 9-11) makes the will a part of the charter so as to make the alleged "restrictions and limitations" effective, would render that act unconstitutional, then this Court will not so hold.

Defendants-in-error contend that that act does not make those "restrictions" effective, and it is erroneous to assume that the Court of Appeals held that it did.

III.

COURTS CANNOT DETERMINE WHETHER AN ACT OF THE LEGISLATURE IS CONSTITUTIONAL OR NOT BY EVIDENCE OUTSIDE OF THE ACT ITSELF.

Kittinger v. Buffalo Traction Co., 160 N. Y.,

377, where at pages 393 and 394 the following language is used:

> "Whether an act of the legislature be constitutional cannot be determined by evidence outside of the statute itself. The test of constitutionality is always one of power. (Cooley Const. Lim., 5th Ed., 220; 3 Am. and Eng. Ency. of Law, 674 and 675, and cases cited.) The motive actuating, and the inducements held out to, the legislature are not the subjects of inquiry by the Courts. The courts are bound not only to assume that the legislature acted with the best motives and with the sole purpose of accomplishing what the statute purports, but where there is room for two constructions of a statute, both equally obvious and reasonable, they must assume that the legislature did not overlook the provisions of the constitution and designed the act to take effect. (Matter of N. Y. & L. I. Bridge Co., 148 N. Y., 540, 551.) It is the duty of the courts as well to give the force of law to an act of the legislature whenever it can be so construed and applied as to avoid conflict with the Constitution. (Cooley Const. Lim., 5th Ed., 218 and 219.) The gratuitous and makeweight allegations in the complaint touching the source of inspiration of the statute are, therefore, not entitled to consideration, as the authorities heretofore cited in support of the proposition that the motives prompting legislative action cannot be inquired into, abundantly demonstrate."

At pages 396 and 397 it is said:

> "This act is general in terms and applies to every situation, like that therein described, in all of the cities of the first and second class in this state. How many there may be we have no means of ascertaining, and it is not necessary for the one claiming the benefits of the

statute to show that other corporations in the same or other cities enjoy the advantages of it."

In Matter of N. Y. El. R. R. Co., 70 N. Y., 327, the Court, at pages 350-352, says:

"A law granting to all horse railway companies, or to all street railway companies, elevated railway companies, the right to lay down railroad tracks, would be constitutional. It would operate uniformly and generally upon all companies in the same situation and belonging to the same class, and that would make it general.

It seems to be conceded by the learned counsel for the appellants, that such a law would be general, if it applied to both existing companies, and such as should thereafter be formed. But I am unable to perceive why a law applicable to existing and future companies should be general, and one confined to existing companies not general. Both laws would, at the time of their enactment, apply to precisely the same existing subjects, and until future companies came into existence, would have precisely the same operation.

But it is claimed that there was but one elevated railway in actual operation at the time of the passage of the act, and hence that it must be deemed that the Legislature had sole reference to that. It was well said by ALLEN, J., in People v. Albertson (55 N. Y., 50), that 'no motive, purpose or intent can be imputed to the Legislature, in the enactment of a law other than such as are apparent upon the face, and to be gathered from the terms of the law itself.' Another learned Judge of this Court has said: 'We are not made judges of the motives of the Legislature, and the Court will not usurp the inquisitorial office of inquiry into the *bona fides* of that body in discharging its duties' (People v. Draper, 15 N. Y., 532,

545, 555). It is not to be presumed or inferred that the Legislature intended to violate or evade the constitutional restraints. The law does not specify any particular elevated steam railway in actual operation, but in its terms, applies to any and all such railways anywhere in operation. How are we to know that there was but one in operation at the time of the passage of the act? Can a Court take proof for the purpose of showing a statute valid and regular upon its face to be unconstitutional? And does the validity of a law which is required to be general, and which is general in its terms, depend upon the number of subjects upon which it can operate, or upon the size of a class to which it applies? These questions must be answered in the negative. We do not know and we cannot assume that the Legislature knew that there was but one elevated steam railway in actual operation in this State, at the time of the passage of the act."

Whether an appropriation of money for some improvement is for a public purpose or one private or local may be inquired into by the courts, but the inquiry must be limited to matters appearing on the face of the act and those of which the Court may take judicial notice. The testimony of witnesses cannot be resorted to. The question must be determined by the language and general scope of the act. (W. W. M. Co. v. Shanahan, 128 N. Y., 345, 357-360.)

In State v. Nelson, 52 O. St., 88, the Court, at page 102, says:

"There is another reason why this statute cannot be declared unconstitutional. While a statute must stand or fall by its operation, rather than by its mere form, yet in passing upon the constitutionality of a statute a court

can judge of its operations only through facts of which it can take judicial notice."

See also Montague v. State, *infra*.

There is no proof nor presumption that there were not when the Act of 1902 was passed other wills within its purview, nor that there will not be such hereafter. If the act had recited all the provisions of the Andrews will and had confined its operations to wills containing the same provisions, but had retained its general form, this Court could not assume that there were not or would not be other wills of the kind.

IV.

(a) LAWS TO BE GENERAL AND UNIFORM, NEED NOT OPERATE UPON EVERY PERSON IN THE STATE. IT IS SUFFICIENT THAT THEY ARE GENERAL AND UNIFORM IN THEIR OPERATION UPON ALL PERSONS IN THE LIKE SITUATION, AND THE FACT OF THEIR BEING GENERAL AND UNIFORM, IS NOT AFFECTED BY THE NUMBER, WHETHER FEW OR MANY, OF THOSE WITHIN THE SCOPE OF THEIR OPERATION. THERE MAY BE REASONABLE CLASSIFICATION FOR PURPOSES OF LEGISLATION. THIS HAS BEEN HELD WITH REFERENCE TO CONSTITUTIONAL PROVISIONS AS TO GENERAL AND SPECIAL LEGISLATION AND ALSO WITH REFERENCE TO THE "EQUAL PROTECTION" PROVISION OF THE 14TH AMENDMENT. A LAW AFFECTING A CLASS IS GENERAL, THOUGH THERE BE ONLY ONE IN THE CLASS, BUT A LAW AFFECTING ONLY SOME INDIVIDUALS OF A CLASS IS SPECIAL.

People v. Wright, 70 Ill., 388, 398, 399;
Chicago & C. R. R. Co. v. Iowa, 94 U.

S., 155, 163, 164; Vermont Loan & Trust Co. v. Whithed, 2 N. Dak., 82, 92-94; Wheeler v. Philadelphia, 77 Pa. St., 338, 348; State v. Cooley, 56 Minn., 540, 549, *et seq.*; McLean v. Arkansas, 211 U. S., 539, 551, 552; Lemieux v. Young, 211 U. S., 489, 496; State v. Baker, 55 O. St., 1; and cases cited under (b), *infra*.

Some examples may be given.

In

Vermont Loan & Trust Co. v. Whithed, *supra*,

the usury law excepted building and loan associations. It was held that this did not make it a special law, since such associations might properly be classified by themselves, and that it was of uniform operation.

In State v. Nelson, 52 O. St., 88, a law enacted "that every electric street car, other than trail cars, which are attached to motor cars," should during certain months be provided with a screen to protect the motorman. The Court (p. 97) says: "The act in question is clearly of a general nature, so that the only inquiry left is whether it is of uniform operation throughout the State. And here again it is equally clear that the law is in operation throughout every part of the State, uniformly as to all classes therein named. Is this sufficient? Soon after the adoption of the Constitution it was said by this Court that the scope and purpose of this section was to prevent laws of a general nature from being in force in some counties and not in others, and these early cases have been followed ever since."

The Court elaborates this doctrine at pages 97-99.

Under a similar constitutional provision the Supreme Court of Indiana lays down the like doctrine in Groesch v. State, 42 Ind., 547, 560-562.

In State v. Nelson, *supra*, the Court, at pages 99 and 100, speaking of classification, says:

"The classification of cities and villages is in its nature territorial, and this Court has uniformly held that such classification must be reasonable and not arbitrary.

On the other hand statutes as to rights of persons and property usually are, and in their nature must be, arbitrary.

Very few statutes apply equally to every person in the state. Some apply only to males, some to females, some to minors, some to persons of unsound mind, some to office holders and some to criminals. As pointed out by *Minchall, J.*, in *Adler v. Whitbeck*, 44 Ohio St., 539, such classes are *arbitrarily* formed by the general assembly, and 'if the legislature has erred in not including what has been excepted from the operation of the law, it is simply an error of judgment in the exercise of its authority, and cannot be reviewed by the Courts.'

In *Adler v. Whitbeck*, *supra*, an effort was made to have the statute, there under consideration, declared unconstitutional because its classification included saloons, and excluded distilleries and breweries, but the effort failed.

A similar effort was made in *Senior v. Ratterman*, 44 Ohio St., 661, because wholesale dealers and manufacturers were not included within the same class, and the effort again failed.

A similar effort was made in *State v. Turnpike Co.*, 37 Ohio St., 481, as to the classification of turnpikes, and the effort again failed.

The Court of Appeals of the State of New York, under a similar provision as to general laws, holds that the Courts cannot control such classifications made by the Legislature," quoting Matter of N. Y. El. R. R. Co., *supra*, page 9.

In Harwood v. Wentworth, 162 U. S., 547, 562-565, an Act of the Arizona Legislature, classifying the counties of the Territory according to the equalized assessed valuation of property in each, for the purpose of fixing the compensation of county officers, was held not to be a local or special law.

In Montague v. State, 54 Md., 481, an act imposing a collateral inheritance tax exempted from its provisions certain relatives, but not husbands. This suit was brought by the State against a husband for a collateral inheritance tax upon moneys received from his deceased wife. Judgment went for the State and an appeal was taken. Pending the appeal the collateral inheritance tax was amended so as to exempt husbands also, and to "apply to all cases of collateral inheritance tax heretofore claimed of, but not actually paid by, the husband of any decedent." It was held that the amendment applied to this case and released the husband. The act was in substance entitled "An Act to repeal Subsection 113 of Section 3 of the Collateral Inheritance Act and to re-enact it so as to read as follows," and the enacting clause followed the title. The only change in said subsection was the insertion of the word "husband." The Constitution of Maryland provided that no local or special laws should be passed in certain cases. The Court held this was a public general law, saying, at page 490:

"But the clause in the Act of 1880, we are

now considering, is not a law of that character. It is not 'An Act for the relief of Charles P. Montague.' It does not appear to have been passed for his especial benefit, and it no more applies to him than it does to all other citizens of the State *in consimili casu*. It may be that the exigencies of this case had something to do with the insertion of this clause in the second section of this Act, but that is a matter which the Courts are not empowered to investigate. We must deal with laws as they appear on their face, and as we find them upon the statute books. As it so stands this, in our opinion, is a public general law, and not a special law within the contemplation of this 33d section of the Constitution."

(b) RETROACTIVE LAWS WITHIN CONSTITUTIONAL PROHIBITIONS ARE ONLY THOSE THAT TAKE AWAY AND IMPAIR VESTED RIGHTS, CREATE NEW OBLIGATIONS, IMPOSE NEW DUTIES OR ATTACH NEW DISABILITIES WITH RESPECT TO PAST TRANSACTIONS. REMEDIAL STATUTES ARE NOT WITHIN THE MISCHIEF AND ARE VALID.

Rairden v. Holden, 15 O. St., 207; Sturges v. Carter, 114 U. S., 511, 518, 519; Haskel v. City of Burlington, 30 Ia., 232, 234, 235; Iowa R. R. Land Co. v. Soper, 39 Ia., 112, 117, *et seq.*; Montague v. State, *supra*.

In Haskel v. City of Burlington, *supra*, an act had been passed providing

"That to all cities and towns heretofore incorporated under special acts and charters, and which do not now possess the right to sell personal or real property for the collection of delinquent taxes * * * full power and authority is hereby granted" to do so.

The Court held that it applied to taxes delinquent at the time of its passage. It further held that, although the cities described were few, it was not a special or local act and that it had a general and uniform operation throughout the state (pp. 236, 237).

In Iowa R. R. Land Co. v. Soper, *supra*, an act recited that judgments had been rendered against various counties, school districts and other municipal corporations, that such corporations had levied taxes to pay them, and that doubts had arisen as to the power to levy them, and enacted "that such judgment taxes, so levied by such corporations, be, and the same are hereby declared legal and valid," &c. It was held that the act was not special or local (pp. 114-116).

In Budd v. Hancock, 66 N. J. L., 133, an act increasing the allowance of the State Commissioner of Public Roads during his term was held not to be a special law. The State constitution prescribed that the Legislature should not pass special laws increasing the percentage or allowance of public officers during the term for which they were elected or appointed. The Court says (pp. 135 and 136):

> "A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes. If nothing be excluded that should be contained the law is general. Within this distinction between a

special and a general law the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply. If the only limitation contained in a law is a legitimate classification of its objects it is a general law. Hence, if the object of a law have characteristics so distinct as reasonably to form, for the purpose legislated upon, a class by itself, the law is general, notwithstanding it operates upon a single object only; for a law is not general because it operates upon every person in the state, but because every person that can be brought within its predicament becomes subject to its operation."

In Kittinger v. Buffalo Traction Co., 160 N. Y., 377, the Court, at pages 392 and 393, says:

"We come now to a consideration of the question relating to the constitutionality of Chapter 649 of the Laws of 1896, and its consideration makes it necessary that the title as as well as the entire Act should be before us. They read as follows:

'An Act to validate and confirm certain consents heretofore given by the local authorities of cities of the first and second class in the construction, operation and maintenance of street surface railroads therein.

Section 1. All consents given since December first, eighteen hundred and ninety-five, and prior to February first, eighteen hundred and ninety-six, by the local authorities of any city of the first or second class, to the construction, operation and maintenance of a street surface railroad in any such city by a railroad corporation which has not complied with the provisions of Section fifty-nine of the Railroad Law or has failed to obtain the certificate therein provided for, are hereby validated and confirmed, and any such corporation may con-

struct, operate and maintain a street surface railroad over, along and upon the streets, avenues, highways and public places described in such consent upon obtaining the consent of the owners of property bounded on such streets, avenues, highways or public places as provided by law.

Section 2. This Act shall take effect immediately.' "

At pages 395, 396, it says:

"The next question is whether this is a general law or a local and special law. If the former, then if the views so far expressed be sound, this respondent is entitled to have the questions propounded answered in the negative, and this order affirmed; if the latter, then still other questions will have to be considered. The recent decision of this Court in Matter of Henneberger (155 N. Y., 420), seems to have emboldened the appellant to argue that this is a local or special law instead of a general one. That question has been presented many times in this court when other statutes were under consideration, but of the decisions rendered thereon not one has found a place in appellant's brief, and we shall soon show that the Henneberger case does not sustain this contention. This Statute is general in form, applies to all the Cities of the State of the first and second class, and to every street railroad therein that obtained consents within the dates named, and has not obtained the certificate required by Section 59 of the Railroad Law, and, hence, on its face, it is a general bill within the meaning of that term as used in the Constitution, according to the decisions of this Court (Matter of N. Y. El. R. R. Co., 70 N. Y., 327; *In re* Church, 92 N. Y., 1; People *ex rel.* N. Y. El. L. Co. v. Squire, 107 N. Y., 593; Ferguson v. Ross, 126 N. Y., 459; People v. Dunn, 157 N. Y., 528-

540). In Church's case the Statute granted to the board of supervisors in any county containing an incorporated city of one hundred thousand inhabitants, where contiguous territory in the county had been mapped out into streets and avenues, power to lay out, open, grade and construct the same, and to provide for the assessment of damages on the property benefited, and the Court held that it was not a local law within the meaning of the State Constitution. In the Squire case the act was entitled 'An act providing for placing electrical conductors under ground in cities of this state and for commissioners of electrical subways.' In answer to the contention of the appellant that the act was a private or local bill, the Court said: 'This act is general in its terms, applying to all cities in the state, of a certain class and to every corporation, carrying on a business requiring the use of electrical wires or conductors in such cities. That the number of such cities is limited or restricted does not make the bill a private or local one within the constitutional meaning and intent of these words was expressly decided in the cases referred to. How many companies there are to which this bill applies we have no means of determining, but the fact that a general law is passed regulating the operations of all such companies, in cities of the class referred to, does not constitute it a private or local bill, although it may happen that such companies are all located in one or more cities of the state.' The argument of the Court answers completely the suggestions of appellant's counsel on this appeal."

In N. Y. El. R. R. Co., 70 N. Y., 327, the Court, at pp. 344-347, says:

"The Legislature could not in a general law determine the necessity of a railway in any

particular locality, nor the routes upon which it was to be constructed, nor the amount of capital, or the name which it was to assume, and there is nothing in any constitutional requirement which imposes upon it the duty in a general law to provide the place of construction for any railroad. It may provide the machinery for the determination of these matters, and what that machinery shall be must depend upon its will. It may authorize these determinations to be made by the individuals who desire to incorporate, by the people resident in the locality to be affected, or by the municipal or county government, and it does not thereby abdicate in any proper sense any part of its legislative power.

2. The claim is made that the entire act is void because it is not a general law. Section 18 of Article 3 of the Constitution, prohibits the passage by the Legislature of private or local bills in many cases, among which are bills 'granting to any corporation, association or individual, the right to lay down railroad tracks,' and bills 'granting to any private corporation, association or individual, any exclusive privilege, immunity or franchise whatever,' and then commands the Legislature to pass general laws providing for such cases. It may be conceded, as claimed by the learned counsel for the appellants, that 'the practical effect and operation of this law is and must be in every instance local, special, and private.' Such is the practical effect and operation of all the general laws for the formation of corporations, except such as are in their nature public. Their object is the formation of private and local corporations, and the command of the Constitution is that such corporations shall be formed under general laws. Under this act railway corporations may be formed, are authorized to be formed in every county, town,

village and city in the State, and fifty householders and taxpayers may, anywhere, at any time, institute proceedings for the formation of a corporation under the act. The act is not stripped of the general character thus conferred upon it by the circumstance that local commissioners are to be appointed to carry it into effect. Whether there shall be a permanent board of commissioners to act for the whole State, or a separate board upon each application, can make no difference. The general railroad act allows a few individuals, who may all reside in the same locality, to incorporate themselves for the construction of a railroad. It would be no less a general act if it provided that the incorporation was to be consummated through commissioners appointed from the same locality upon the application of the same individuals who can now under the present law incorporate. This law, offers to citizens in all parts of the State, the same opportunities to incorporate under it. It matters not that the corporations formed may not be uniform in all their characteristics. They would be uniform in all their general powers and corporate functions. Corporations formed under the general manufacturing law are not in all respects uniform. They may differ in the amount of their capital, the number and amount of their shares, the time of their duration, the number and names of their officers, in the nature of their business, in the mode of the transaction of their business, and in many other important particulars. Such is necessarily the case with corporations formed under a general law, and yet their general powers and corporate qualities are the same.

It matters not that every citizen of the State cannot become a corporator in a company to be formed under the act, and that the practical operation of the act is to confine the power to incorporate to a few individuals.

The act in form offers the same opportunities to all the citizens of the State. The fact that some are not able to avail themselves of the opportunities does not impugn the general character of the act. When a railroad, under the general railroad law of 1850, is constructed from one point to another, the topography of the country through which it runs may be such as to forbid the construction of another railroad. But one elevated railway can be constructed through the same street, and hence upon any route in a city, but one company for the construction of a railway is practicable; and while the legislature could not by a private act incorporate such company, the problem for it to solve by the general act was, how such railways could be constructed under a general act authorized by the constitution.

It would not be feasible to permit the formation of several corporations to operate railways in the same streets, nor would it be wise to lease a railway to be constructed by the corporation which by accident was first in time. Nor would the same plan for the construction and operation of railways in all places be practicable. Hence it became the duty of the Legislature by a law, having general operation, to provide machinery which should determine the necessity of a railway, and the streets and places where it should be constructed, the company or organization of individuals which should construct it and the plan upon which it should be constructed. While upon any route the franchises are given to one corporation, the formation of that corporation is open to all persons upon the same terms, and no person is excluded from becoming a stockholder therein. The methods adopted in this Act seem to be well devised to attain the end sought, and it is quite certain that without some such methods no elevated or underground railways can be constructed. And this Act is not limited in time. While it is

true that one set of commissioners can act upon but one application, a new set of commissioners can be appointed whenever any persons desire to form a corporation and present the proper application. I can, therefore, entertain no doubt that this is a general Act within the meaning of the Constitution.

3. A more serious objection is made that Section 36 of the Act is in conflict with the Constitution, and the part of that section now to be considered is repeated as follows: 'The said Commissioners may fix and determine the route or routes by which any elevated steam railway or railways now in actual operation may connect with other steam railways, or the depots thereof, or with steam ferries, upon fulfilment by such elevated steam railway company, so far as it relates to such connections, of such of the requirements and conditions imposed by said commissioners under section four of this act, as are necessary to be fulfilled in such cases under section 18 of art. three of the Constitution of this State; and such connecting elevated railway shall in such case possess all the power conferred by section 26 of this act. And when any connecting route or routes shall be so designated, such elevated railway company may construct such connection with all the rights, and with like effect as though the same had been a part of the original route of such railway.'

No railway company could have the benefit of these provisions except it had an elevated railway in actual operation at the time of the passage of the act."

At page 350:

"We are therefore brought to the question, were the provisions contained in section thirty-six a general law, within the meaning of the Constitution?

It is not easy to frame a definition of a general law which will be found precisely accurate in every case. A law applicable to all the people of the State, and operating in all parts of the State, would be most general. But a law may be general without affecting all the people of the State. A law regulating the rights of married women, or of minors, or of adults, or of aliens, would be general, and it would be general, although confined to the persons in being at the time of its passage. So, a law conferring new rights upon all existing insurance companies, or railroad companies, or manufacturing companies, would be general. A law which relates to persons or things as a class is general, but one which relates to particular persons or things of a class is special and private."

At pages 352-354:

"But the argument need not be rested here. Section thirty-six need not necessarily be treated as if its provisions were contained in a separate, independent act. It is part of a general act, and that act embodies a general scheme for the construction of elevated and underground steam railways. It provides for the formation of new companies for their construction; and where a route designated by the commissioners is coincident with a route upon which an existing company is authorized to construct, such company may construct its road under the act, and any company having an elevated railway in actual operation may construct the connections specified. The act is thus made applicable to companies to be formed, and to existing companies, and is thus made as general as it can be. In any case the constructing company is to comply with the plans prescribed by the commissioners. By what rule of construction are the provisions applicable to existing companies

isolated from the rest of the act? They are an appropriate part of the general scheme, and it could make no difference whether there was one or many existing companies. The existing companies have no exclusive privileges or functions conferred. They are simply placed on a footing of equality with new companies which may be formed under the act.

Suppose a general act should be passed for the construction and operation of railroads with four tracks, and that it should contain a provision by which any existing railroad of four tracks could come under the provisions of the act, would it, as to such existing railroad, even if it were the only one, be a private act? The whole act would be a general act applicable to railroads with four tracks.

It is true that this act authorizes existing railways to lay down tracks, but this it does as part of a general scheme devised by the Legislature, and hence it is not unconstitutional. It may be that no new railways will ever be constructed by companies formed under the act, and it may be that the Legislature designed, as alleged, to benefit two elevated railway companies in existence at the time of the passage of the act. But all this can make no difference here, so long as the act in its terms, and possible application, is general. Section 49 of Chap. 140, of the Laws of 1850 (the General Railroad Act), makes the provisions of that act generally applicable to existing railroad corporations. It will hardly be claimed that that section, as to existing corporations, is a private act. Its purpose and effect were to bring such corporations under the general scheme devised by a general law. It made the law more general than it otherwise would have been.

It may be that the construction which we have thus given to this act, and particularly to section thirty-six, may leave the way open to great abuses of legislative power, illustra-

tions of which were given in the learned arguments before us. There may be ways for a Legislature to circumvent a constitutional provision without violating it. History shows by many examples, how the spirit of a Constitution may be disregarded, and yet its letter observed. But there is a vital difference between the abuse of legislative power and its exercise in palpable violation of the Constitution. For the former, the remedy is with the people alone, in the choice of faithful representatives who will respect their will; for the latter, alone, the courts clothed with power always to be exercised with caution, can give as a remedy."

The Act of 1902, therefore, is not unconstitutional, because affecting wills already probated. Indeed, if it had been confined to such, but had included all of the class, it would have been valid.

Matter of N. Y. El. R. R. Co., *supra*, page 8.

V.

THE DETAILS OF THE OHIO CORPORATION MENTIONED IN THE WILL OF MR. ANDREWS DO NOT CONSTITUTE A TRUST. THEY ARE NOT CONDITIONS PRECEDENT, BUT AT MOST CONDITIONS SUBSEQUENT.

The contention of the plaintiffs-in-error is that the will of Mr. Andrews contains certain "restrictions and limitations," and that it was his intention that these should be contained in the charter of the corporation which he directed to be formed, so as to make them "operative and binding upon the incorporators" (Appendix Brief, p. 17).

Among these restrictions which were (as they contend) to be binding on the incorporators could

not be the provision as to directors, for this was to be operative only "if and so far as may be consistent with law and practicable," nor the provision as to accumulation, for this was to be operative only "in the judgment of the directors" and "in their discretion" (Rec., p. 7). The only "restrictions and limitations" that remain are the following (Rec., p. 7):

"Said institution shall contain, among others, a sewing department, cooking department, designing department and departments of phonography and typewriting and other useful work that would afford the pupils employment in life, including such new discoveries and inventions as may be made from time to time tending to enlarge the opportunities for useful and honorable employment for women, and such as will aid them in obtaining honorable and independent positions in life. Such school to be open only to girls between the ages of ten and sixteen, both inclusive.

Not exceeding one-tenth of the sum devoted to the said institution by the fourth paragraph hereof may be used for the erection of suitable buildings therefor on the said farm, or in the contingency above specified, for the purchase of suitable premises in said town and the erection of such buildings thereon, and the income of the remaining nine-tenths shall be devoted to the support and maintenance of said institution."

The testator (Rec., p. 6), by the 4th Paragraph of his Will, gave the residue of his estate "to the corporation hereinafter directed to be formed." By the 5th Paragraph (Rec., p. 6) he directed his executor "to procure under the laws of the State of Ohio, an incorporation to be formed with

proper powers, for the purpose of establishing an institution * * * for the free education of girls and for their support in proper cases during education, with a special view toward rendering them self-supporting."

Here is the primary and essential object—the general corporate purpose. The gift is within and for that general purpose. The sentences (Rec., p. 7) above referred to which follow in the will are merely directions as to the management of the school and its funds when the school has been organized and the funds have been received. They do not express conditions precedent which prevent the vesting of the gift. They are at most conditions subsequent. If The Andrews Institute had been an existing corporation for the education of girls and the testator had given the residue of his estate to it, and had stated that the fund should be used for girls between 10 and 16 years old, that not more than one-tenth of it should be used for building, &c., and that there should be sewing and cooking departments, &c., these provisions would not constitute a trust or a condition of a sort to prevent the vesting of the gift until the trust had been executed or the condition performed. No different rule will prevail in the case of a corporation directed to be formed.

In the direction as to the use of the fund in the sentence quoted above, it is referred to as "the sum devoted to the said institution by the fourth paragraph hereof," in other words as already belonging to the institution.

The Fifth paragraph (Rec., p. 6) directs that the corporation shall be established in the town of Willoughby. Suppose the will had said no more than that a corporation should be established at

Willoughby for the free education of girls, would plaintiffs-in-error contend that the restriction of location in the charter to Willoughby made it a special charter or the act under which the corporation was formed a special act? If not, why would the other so-called restrictions have that effect?

Plaintiffs-in-error contend that there is no trust in the gift, that the gift is direct and absolute to the corporation, but that somehow it is to take it subject to certain charter restrictions. These, as they relate to the management and use of the fund after the corporation gets it, are conditions subsequent, not precedent. At page 2 of their Appendix Brief, they say:

> "We argued that this was not a gift upon condition, nor was it a gift to trustees, but a direct and absolute gift to the corporation. That in order to ensure a compliance with his wishes the testator had adopted the expedient of fixing in the charter itself these several restrictions and limitations of the power to be exercised by the directors."

And at page 19 of their brief on this hearing:

> "The bequest is made direct to the corporation (Rec., 6), which is to receive the residue as its own property, and holds it not as trustee, but as absolute owner."

On page 30 of that brief, they reiterate and emphasize this position, alleging that no condition is attached to the words of the gift, that the testator treats the corporation as being already existing, and gives the residuum to it precisely as he had given a legacy to his sister Lury, that the restriction of using not exceeding 1/10 for building is not of the essence of the gift, and that the restric-

tion attaches not to the gift, but to the corporation, whatever this last expression may mean.

If the alleged restrictions and limitations were in the charter, how could they be enforced otherwise than if not contained therein? In either case the intervention of the attorney general would be necessary. If the will were recited in the charter as prescribed by the Act of 1902 (though, as plaintiffs-in-error contend, not an operative part of it), the attorney general could enforce the directions of the will by appropriate suit. The corporation is not private and without visitors (as claimed by plaintiffs-in-error on page 19 of their Brief on this hearing), but a public charitable corporation, and both by the general law and the Act of 1902, the attorney general is its visitor.

In Executors of McDonogh v. Murdoch, 15 How., 367 (cited with approval in Russell v. Allen, 107 U. S., 163, 169), this Court, at pages 410 and 411, says:

> "We shall now examine the question, whether the conditions annexed to this legacy, the prohibition to alienate or to divide the estate, or to separate in its management the interest of the cities, or their care and control, or to deviate from the testator's scheme, invalidate the bequest.
>
> The appellees contend that the performance of these conditions is impossible; that they are contrary to public policy; introduce tenures at variance with the laws; and would result in mischief to the State. That the conditions are of the essence of the gift, and the will would not conform to the dispositions of the testator, if they should be erased or disregarded. They insist that the appellees take by virtue of the law, but the devisees claim under a will. That, if they cannot exhibit a

clear and valid devise of the property, the legal right of the heir should not be defeated. That this Court cannot, under the guise of judicial construction, sanction an instrument from which the main prescriptions of the testator are obliterated."

At pages 411 and 412:

"The common-law rule depends upon the fact, whether the performance of the illegal, immoral, or impossible condition is prescribed as precedent or subsequent to the vesting of the estate of the devisee. In the former case, no estate exists till the condition is performed and no right can be claimed through an illegal or immoral act. In the latter case, the estate remains, because it cannot be defeated as a consequence of the fulfilment of an illegal or immoral condition. This, however, applies only to devises of real estate; for the ecclesiastical and chancery courts, in regard to bequest of personalty, follow the rule of the civil law, as above expressed. [In all dispositions *inter vivos* and *mortis causa*, impossible conditions, those which are contrary to the laws or morals are reputed not written (p. 411).] * * *

The conditions in the case before us, which impose restraints upon alienation and partition, and exact a particular management through agents of a specified description, are conditions subsequent, and would not, by the ruleof the common law, divest the estate, if pronounced to be illegal or immoral. * * *

These conditions belong, too, to the class that are reprobated as repugnant to the legal rights which the law attaches to ownership. The common law pronounces such conditions void, in consequence of that repugnancy, and the civil law treats them as recommendations and counsel, not designed to control the will of the donee."

At pages 413 and 414:

> "The question remains to be considered, whether the destination of the legacy to public uses in the City of Baltimore affects the valid operation of the bequest. All the property of a corporation like Baltimore is held for public uses, and when the capacity is conferred or acknowledged to it to hold property, its destination to a public use is necessarily implied. Nor can we perceive why a designation of the particular use, if within the general objects of the corporation, can affect the result; nor is there anything in the nature of the uses declared in this will which can withdraw from the legacy a legal protection."

In Perin v. Carey, 24 How., 465, certain real and personal property had been devised and bequeathed to the City of Cincinnati and its successors, for the purpose of building, establishing and maintaining as far as practicable after his decease two colleges for the education of boys and girls, and in case of a surplus, for the support and education of orphans, and the testator provided that none of his real estate devised should at any time be sold. This Court sustained the gift.

At pages 496, 497, this Court says:

> "The first act passed under the Constitution of 1851, relating to corporations, was to enable the trustees of colleges, academies, universities and other institutions for promoting education, to become bodies corporate. We will give it in its terms, for nothing in the legislation of that state can show more satisfactorily than it does, that public spirit there is, in harmony with and fully up to that of the age, upon the subject of education. The language of the first section is, that any number of persons not less than five, desiring to

establish a college, university or other institution for the purposes of promoting education, religion or morality, agriculture and the fine arts, may, by complying with the provisions of the act, become a body corporate and politic, with perpetual succession, and may assume a corporate name, by which they may sue and be sued, plead and be impleaded, in all courts of law and equity; may have a corporate seal, and the same alter or break at pleasure; may hold all kinds of estate, real, personal and mixed, which they may acquire by purchase, donation, devise, or otherwise, necessary to accomplish the objects of the corporation; *and further, the trustees of any university, college or academy, may hold in trust any property devised or bequeathed, 'or donated' to such institution, upon any specific trust consistent with the objects of said corporation;* also, when any number of persons shall have procured by subscription, donation or devise, purchase or otherwise, the sum of $500 for the purpose of establishing an academy, they may become a body corporate, &c., &c., and do all acts and things necessary for the promotion of education and the general interests of such academy. * * *

The legislature has succeeded in giving to corporations, for the promotion of education, what the learned gentleman who brought this bill said were the requisites of a corporation: Lawful existence; artificial capacity and perpetuity of existence; and, we add, the unquestioned enjoyment of all these privileges, which courts of equity have said for more than two hundred years they were entitled to, in the construction of devises and gifts for charity, and for the administration of them."

At page 505, this Court says:

"The law is, that where the corporation has a legal capacity to take real or personal es-

tate, then it may take and hold it upon trust in the same manner and to the same extent as private persons may be. *It is true that if the trust be repugnant or inconsistent with the proper purposes for which it was created, that may furnish a good reason why it may not be compelled to execute it. In such a case, the trust itself being good, will be executed under the authority of a court of equity.* Neither is there any positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purposes of its institutions, but collateral to them, as for the benefit of a stranger or another corporation. But, if the purposes of the trust be germane to the objects of the corporation, if they relate to matters which will promote and perfect these objects, if they tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry and happiness, where is the law to be found which prohibits the corporation from taking the devise upon such trust in a State where the Statutes of Mortmain do not exist, the corporation itself having an estate as well by devise as otherwise? We know of no authority which inculcates such a doctrine, or prohibits the execution of such trusts, even though the act of incorporation may have for its main object mere civil and municipal government and powers. 2 How., 190. This court announced the same principle again in the case of McDonogh v. Murdoch, 15 How., 367, with other and new illustrations, and with direct reference to the capacity of a corporation to take such trusts, if within its general objects, or such as were collateral or incidental to its main purpose. There is nothing in the Ohio Statute of Wills to prevent corporations from taking by devise."

In Jones v. Habersham, 107 U. S., 174, 183, 185,

it was held that conditions in charitable gifts that no material alteration or change should be made in a church, that the land on which a school room stands should not be alienated, and other conditions were conditions subsequent, and did not prevent the vesting of the gifts.

Matter of N. Y. El. R. R. Co., *supra*, pp. 19, 20.

In Wetmore v. Parker, 52 N. Y., 450, it is held that a gift to a charitable corporation of a fund to be perpetually invested and only the income to be used does not violate the statute against perpetuities nor create a trust as that term is applied to property. The corporation has the entire property.

In Bird v. Merklee, 144 N. Y., 544, it was held that a gift to churches to buy coal for the poor was an absolute gift to the corporations and created no trust.

At page 550 the Court says:

> "The fact that the testator has designated the purpose for which this legacy must be used does not indicate a desire upon his part to create a trust. If it were necessary in order to sustain the bequest these words of designation by the testator might be treated as merely precatory, but we think it was entirely competent for him to apply his bounty to the whole or any one or more of the various purposes for which the corporations are authorized to hold property. This is fully reasoned by Judge DENIO in Williams v. Williams (8 N. Y., at bottom p. 530).
>
> The fundamental error in this case, in the Court below, and in cases that are frequently coming to the attention of this Court, is the failure to recoguize the fact that gifts to

religious and charitable corporations to aid in carrying out the purposes for which they are organized, whether by expending the principal of a bequest, or the income of a bequest to be invested in perpetuity, do not create a trust in any legal sense, do not offend against the statutes of perpetuities, are not to be judged by any of the well-known rules pertaining to the law of trusts as applied to private individuals."

In Matter of Griffin, 167 N. Y., 71, the testator made a gift "to the Round Lake Association heretofore known as the Round Lake Camp Meeting Association of the Methodist Episcopal Church of the Troy Conference. * * * The amount so hereby given to said association to be prudently invested by it and the income and profits arising therefrom to be devoted and applied by said association to the support and maintenance of a school at said Round Lake, known as the Round Lake Summer Institute."

The majority of the Court of Appeals concurred in the opinion of CULLEN, J., who, at pages 82 and 83, says:

"In my opinion the testator did not intend by the eighth paragraph of his will to create a trust in favor of the incorporated academy named the Round Lake Summer Institute, but to make an absolute gift for its own benefit to the Round Lake Association, formerly known as the Round Lake Camp Meeting Association of the Methodist Episcopal Church. I concede that a direction for the investment of a fund and application of its income would be sufficient to create a trust where it appeared from the terms of the will taken as a whole, and the situation of the parties, that such was the intent of the testator, even though he did not in express terms provide that the gift

should be in trust. I think that in the present case the terms of the will and the situation and character of the alleged trustee and beneficiary plainly negative any such intent."

He also says (p. 84):

"His gift in the Round Lake Association was doubtless for the purpose expressed in his will of maintaining a school by the association, as had been done for some time before the incorporation of the academy, but still for the purpose of maintaining a school which should be a part of and entirely dependent upon the association, and not for a separate corporation that in the future might become wholly disassociated from the Round Lake Association. In other words, he intended to give his property to the Round Lake Association, to maintain its own school, not as trustee for the benefit of another, though doubtless it may use the other for the purpose so long as the parties contract therefor. Such a gift, though the corporation may be instructed to maintain the principal intact and use the income only for a specific purpose, does not create a trust."

In Johnston v. Hughes, 187 N. Y., 446, the testator directed his real estate to be sold and the net proceeds to be divided as follows: "Three equal fourth parts thereof to the Trustees of St. Francis Hospital in the City of New York, for the benefit and use of the Blessed Virgin Mary Purgatorial Fund of said hospital." The Court held that this gift was intended for the corporation entitled "The Sisters of the Poor of St. Francis."

"It was contended, however, on the part of the respondents that the gift was void for the reason that the sisters had never maintained in the hospital a 'Blessed Virgin Mary purga-

torial fund'; that the only possible object of such a fund was the saying of masses for the spiritual welfare of the souls of the dead in purgatory and that the sisters, as such corporation, had no power to act as trustees for such a fund or purpose, and that it was not for a corporate use.

It may be conceded that if the devise was to the sisters in trust for the benefit of others that they, under the statute by which they were incorporated, were not empowered to execute the trust. But we entertain the view that no trust was created by the will so far as the bequest to the sisters' corporation is concerned" (pp. 449, 450).

"Three-fourths of the fund so derived from the sale of the real estate was given to the St. Francis Hospital, so called, but which in fact was the sisters corporation. This bequest, as he states in his will, was 'for the benefit and use of the Blessed Virgin Mary purgatorial fund of said hospital.' There is no gift to the corporation in trust—no direction for investment or for the payment over of any income or portion of the fund for the use and benefit of any person in being. It is, therefore, quite apparent that no trust was created with reference to the proceeds of the sale of the real estate. As we have seen, there was a gift and devise to the corporation. In terms it is an absolute gift, but there is added thereto the clause already quoted, for the benefit and use of the Blessed Virgin, etc., which, it is contended, operates to cut down the absolute bequest to a conditional gift limited to a specific purpose, for which the sisters had no power to use it.

In the case of Clarke v. Leupp (88 N. Y., 228), TRACY, J., in delivering the opinion of the Court, says:

'It is well settled by a long succession of well-considered cases that when the words of

the will in the first instance clearly indicate a disposition in the testator to give the interest, use and benefit of the estate absolutely to a donee it will not be restricted or cut down to any less estate by subsequent or ambiguous words inferential in their intent.'

In Lambe v. Eames (L. R. [10 Eq. Cas.], 267), it is said:

'Whenever, the will begins with an absolute gift, in order to cut it down, the latter part of the will must show as clear an intention to cut down the absolute gift as the prior part does to make it.'

In Clay v. Wood (153 N. Y., 134), GRAY, J., says:

'Where there is an absolute gift of real or personal property, in order to qualify it or cut it down, the latter part of the will should show an equally clear intention to do so by the use of words definite in their meaning and by expressions which must be regarded as imperative.'

Are the words used by the testator definite in their meaning, showing an imperative intent on the part of the testator not to make the gift absolute? It seems to us not. It says that the bequest is for the use and benefit of the purgatorial fund of the hospital. He merely adds it to the purgatorial fund. He makes no imperative or other direction with reference to the use that should be made of it, but leaves it as the fund of the hospital to be disposed of by the authorities thereof. It turns out that there was no such fund in existence and that the only use that could be made of such a fund was the saying of masses for the spiritual welfare of the souls of the dead in purgatory. The fact remains, however, that he thought there was such a fund in

charge of the sisters and that he wished his fund to be devoted to a similar use by the sisters, but there is nothing in this that indicates an intention on his part to cut down or deprive the sisters of the control of the bequest. It will be observed that there are no conditional or qualifying words used. Had he made the bequest upon the condition that the Sisters should do some specified act inconsistent with their corporate power a different question would have been presented. He has not imposed any conditions whatsoever. *He merely indicated a purpose, thus making the gift his primary object and the use to be made of it his secondary purpose.* Had he stated the use to be the supplying of clothing to the inmates of the hospital and the sisters had found that it was unnecessary to use it for clothing, but that its use was necessary for the supplying of food, it would hardly be claimed that the use suggested operated to deprive the bequest of its absolute character and constituted the gift conditional; or even that the diversion of its use to another purpose worked a forfeiture. Should a testator leave to his daughter a sum of money with which to purchase for her use a diamond necklace, the gift would be absolute and vest the money in her, and if she should thereafter choose to invest it in bonds instead of diamonds there would be no cause for complaint that the gift was invalid" (pp. 450-452).

It thus appears that it would be against the great weight of New York authority to hold that Mr. Andrews intended in his will certain operative charter restrictions as a prerequisite to the vesting of his gift, and it will not be presumed that the Court of Appeals ignored its previous decisions.

Do the plaintiffs-in-error contend that a corporation to carry out the purposes of Mr. Andrews

in his will could not have been formed under the general corporation law of Ohio in force when he died? On pages 32 and 33 of their brief on this hearing they admit that such a corporation could be formed except that "such new corporation could not contain in its articles the restriction of the use of the money received by the corporation" (clearly a condition subsequent under the authorities we have cited).

> "In that event, standing by themselves, these requirements would not have rendered the charter special—since the directors would have been invested with general powers to carry into effect these specified objects, allowable as so many features of a corporation formed under the general law for the free education of girls."

VI.

NO FEDERAL QUESTION IS INVOLVED IN THIS CASE.

IF THERE BE A FEDERAL QUESTION, IT WAS NOT SPECIALLY SET UP AND CLAIMED AT THE PROPER TIME AND IN THE PROPER PLACE.

THE FORMATION OF THE ANDREWS INSTITUTE FOR GIRLS CAN BE SUSTAINED UNDER THE GENERAL LAWS OF OHIO IN FORCE AT THE TESTATOR'S DEATH.

THE ACT OF 1902 IS A GENERAL LAW OF UNIFORM OPERATION, AND DOES NOT VIOLATE THE OHIO CONSTITUTION.

IF A CORPORATION WERE FORMED UNDER IT WITH RESTRICTIONS AND LIMITATIONS IN ITS CHARTER DIFFERENT FROM THOSE IN ANY OTHER CHARTER, SUCH CORPORATION WOULD BE VALID AND NOT CONTRARY TO SAID CONSTITUTION.

THE WILL OF MR. ANDREWS DOES NOT REQUIRE THAT THE "RESTRICTIONS AND LIMITATIONS" CLAIMED BY PLIANTIFFS-IN-ERROR SHALL BE CONTAINED IN THE CHARTER OF THE CORPORATION HE DIRECTS TO BE FORMED.

THE ANDREWS INSTITUTE FOR GIRLS, DEFENDANT-IN-ERROR, IS THE CORPORATION INTENDED BY THE TESTATOR.

VII.

THE FEDERAL SUPREME COURT, ON A WRIT OF ERROR TO A STATE COURT, HAS NOT THE JURISDICTION OF A GENERAL REVIEWING COURT IN ERROR, BUT IS LIMITED TO A CONSIDERATION OF THE SPECIFIC INSTANCES OF DENIALS OF FEDERAL RIGHTS ESPECIALLY SET UP IN THE STATE COURT AND DENIED BY THE RULINGS AND JUDGMENT OF THAT COURT.

FINDINGS OF FACT ARE ACCEPTED AS CONCLUSIVE BY THE FEDERAL SUPREME COURT ON WRIT OF ERROR TO A STATE COURT.

Waters-Pierce Oil Co. v. Texas (No. 1),
212 U. S., 86, 97.

The State Court had before it questions of domestic law, and questions of fact. If the judgment is reversed, we shall be thrown back to the retrial of these, when, after the lapse of ten years, it will be difficult, if not impossible, to obtain the evidence.

VIII.

THE WRIT OF ERROR SHOULD BE DISMISSED OR THE JUDGMENT AFFIRMED.

JAMES W. HAWES,
Attorney for G. C. St. John,
as Executor, &c.,
Defendant-in-Error.

APPENDIX.

Counsel for plaintiffs-in-error in their brief on this hearing complain that the Act of 1902 authorizes the Board of Directors to adopt by-laws not inconsistent with the Constitution and laws of Ohio, instead of confining them to such as are not inconsistent with the provisions of the will.

The general laws in force at the death of Mr. Andrews gave the same authority. The revised statutes provided:

"Sec. 3249. Every corporation may adopt a code of regulations for its government, not inconsistent with the Constitution and laws of the State.

Sec. 3250. The Trustees or Directors of a corporation may adopt a code of by-laws for their government, not inconsistent with the regulations of the corporation, or the Constitution and laws of the State, and may change the same at pleasure."

The following section relates to Trustees or Directors:

"Sec. 3240. A majority of the subscribers of the articles of incorporation formed for a purpose other than profit, may elect not less than five Trustees of the corporation who shall hold their office till the next annual meeting, or until their successors are elected and qualified; but in the case of religious corporations and institutions incorporated for the purpose of promoting education, science or art, the regulations of such corporations may provide for the length of time said Trustees shall hold their offices, the term thereof not to exceed in number of years the number of such Trustees, provided that lodges, societies or bodies of any secret or benevolent order incorporated under the laws of this State, may elect such number of trustees, not less than three, as may be provided in the laws or regulations governing such lodge, society, or body, and the election of such trustees may be held at the time specified in such laws or regulations. Provided further, that the members of any corporation heretofore organized, or that may hereafter be organized, for the purpose of owning and conducting a hospital for sick and disabled persons, may provide for the election of not less than five, nor more than fifteen Trustees who shall serve during life, and, also, that in case of vacancy in the Board of Trustees of such association by death, resignation or otherwise, the remaining members of such Board may fill such vacancy. In case of a corporation heretofore organized for such purpose, such regulations providing that the Trustees shall hold office, during life, may be adopted at any annual meeting, or at any special meeting of the association duly and regularly called; but notice of such proposed change in the regulations shall be pub-

lished for three successive weeks in some newspaper published, and of general circulation, at the place where such hospital is located (R. S., 1880; 78 v. 200; 80 v. 79; 85 v. 166; 95 v. 547)."

The first clause of §3240, down to and including the words "elected and qualified" was in the Revised Statutes of 1880. The following portion down to, and including the words "specified in such laws or regulations," was added by amendments in 1881, 1883 and 1888. The last portion, commencing with the words "provided further," was added by further amendment in 1902.

[5398]

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APR 2 1936
JAMES B. McKENNEY

Supreme Court of the United States

OCTOBER TERM, 1936

No. 618

SMITHSONIAN INSTITUTION, et al.

Plaintiffs in Error

vs.

GAMALIEL C. St. JOHN, as Executor, &c., under the Last Will of WALLACE C. ANDREWS, Deceased, et al.

Defendants in Error

Brief of Defendant in Error

The Andrews Institute for Girls

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Supreme Court of the United States.

SMITHSONIAN INSTITUTION and MELVILLE W. FULLER, as Chancellor of said Smithsonian Institution, *Plaintiffs-in-Error,* *vs.* GAMALIEL C. ST. JOHN, as Executor and Trustee under the Last Will and Testament of Wallace C. Andrews, Deceased, THE ANDREWS INSTITUTE FOR GIRLS, et al., *Defendants-in-Error.*	No. 613.

BRIEF OF DEFENDANT-IN-ERROR, THE ANDREWS INSTITUTE FOR GIRLS.

Statement.

Wallace C. Andrews, a native of Ohio, but a resident of New York, died in April, 1899, leaving a will (R., pp. 5-8) in which Gamaliel C. St. John and Mr. Andrews' wife were executors. After certain large bequests to relatives, all of which have been paid, he gave the residue of his estate, amounting to more than One million three hun-

dred thousand dollars (R., p. 37), to a corporation which he directed his executors to cause to be formed under the Laws of Ohio, for the purpose of building and maintaining an industrial school for girls in the town of Willoughby, Lake County, Ohio, a suburb of Cleveland, and supporting needy girls during the time of their education therein.

We may safely assume that the testator, living in New York, knew how well a Board of Directors consisting of public officials had administered an institution in that city, formed in pursuance to a will which was sustained by this Court. (*Inglis vs. The Trustees of Sailors' Snug Harbor*, 3 Peters, 99). He provided in his will that "if and so far as may be consistent with law and practicable", the board of directors should be the Governor, the Member of Congress, the Mayor of Willoughby, the Treasurer of Lake County, for the time being, and Mr. St. John, whose successor should be a resident of Willoughby.

The testator, following a stereotyped idea in wills making gifts to corporations to be formed (*Burrill vs. Boardman*, 43 N. Y., 254; *Cruikshank vs. Home for the Friendless*, 113 N. Y., 337) provided in the eighth clause of his will (R., p. 7) as follows:

> "In case my intention with respect to the said institution for girls shall *because of illegality fail, or become impossible of realization*, I then devise and bequeath the sum intended for it to the Smithsonian Institution at Washington, District of Columbia, to be devoted to the purposes for which it was established."

Mr. Andrews' wife lost her life in the same conflagration that ended his life.

In May, 1902, Mr. St. John, the executor, caused The Andrews Institute for Girls to be incorporated under the laws of Ohio in accordance with the directions of the will (R., pp. 11-12).

Thereafter the executor brought an action in the Supreme Court of New York against The Andrews Institute for Girls, the Smithsonian Institution and the next of kin, in which he sought a construction of the will and a determination of the rights of the parties.

The Andrews Institute filed its answer (R., pp. 16-19), averring that it was legally incorporated under the Laws of Ohio, without specifying any particular act; that it has a valid and legal existence thereunder and is the corporation created under the terms of the will and therefore entitled to the residuary estate.

The Smithsonian Institution filed an amended answer in which it alleged, among other things, that The Andrews Institute was attempted to be organized under an Act of the Legislature of Ohio, passed in March, 1902, entitled "An Act to provide for the administration of charitable trusts in certain cases." which it alleged was unconstitutional and void as being contrary to Section 1 of Article 13 of the Ohio Constitution, and that therefore said Andrews Institute for Girls had never been duly incorporated.

The gift to The Andrews Institute was contested through all the Courts of New York by the Smithsonian and the next of kin on a number of grounds, including the claim, among others, that it violated what is known in New York as "The Statute of 1860", which prevents a testator who leaves a wife, etc., surviving him, giving more than half of his estate to a charitable corporation, etc.

The New York Courts decided that the "Statute of 1860" above referred to, did not apply, and that there was no merit in any of the Smithsonian's contentions, and in effect decided that the testator's "intention with respect to the said institution for girls" did not, "because of illegality, fail",

that The Andrews Institute was legally incorporated under the Laws of Ohio, and entitled to the residuary estate.

The Smithsonian Institution obtained a writ of error to this Court on the followings grounds (R., p. 62):

> "I. Error in that, after holding that by virtue of the Act of the General Assembly of Ohio, of March, 1902, the will of Mr. Andrews had been constituted a part of the articles of incorporation of The Andrews Institute, incorporated under that Act, so as to make the limitations and restrictions of said will effective as charter provisions, the Court did not apply to the said Act of 1902 the inhibition of section one, article thirteen of the Constitution of Ohio, forbidding the General Assembly to pass any special act conferring corporate powers.
>
> "II. Error in that the Court, in contravention of Section 1 of Article IV of the Constitution of the United States, failed to give full faith and credit to section one, article thirteen of the Constitution of Ohio, forbidding the General Assembly to pass any special act conferring corporate powers, though asked so to do in the event it should hold that the limitations and restrictions of Mr. Andrews' will became effective by being made a part of the articles of incorporation, which holding it did make."

There is no merit in the contentions of the Smithsonian for the following reasons:

1. If it be assumed that The Andrews Institute was incorporated under the Ohio Act of 1902, and under no other general law of Ohio, that Act is perfectly valid under the Constitution of Ohio.

2. No Court has found that The Andrews Institute was incorporated under the Act of 1902. There are other general laws of Ohio, which have

not been assailed, under which its incorporation can be sustained. Therefore the decision of the New York Courts in this case is sustainable without the necessity of passing on the constitutionality of that Act, and consequently no Federal question is involved.

3. The New York Courts not only did not refuse to give full faith and credit to the Act of 1902 or to the Ohio Constitution, but recognized their validity and their binding force. The construction of a statutory or constitutional provision of another State, although the Courts do not interpret it as parties believe it should be, does not bring the case within the Constitutional requirement to give full faith and credit, etc.

4. There was not the slightest hint or suggestion in this case of the Federal Constitution or a Federal question until after it was decided adversely to the Smithsonian by the highest court of New York (R., p. 60). Therefore, even if there might have been a Federal question in this case, the Smithsonian can not avail itself thereof in this Court.

5. The Andrews Institute was a *de facto* corporation of Ohio, into the validity of the incorporation of which the courts of New York could not inquire.

6. If the incorporation of The Andrews Institute were only sustainable under the Act of 1902, and that Act were unconstitutional, the Smithsonian would have no standing to complain, because Mr. Andrews' property would not go to it, inasmuch as it was not and could not be shown that no corporation could be formed under the existing laws of Ohio to meet the requirements of his will, or that no constitutional Act could be passed by the Legislature of Ohio in the lifetime of Mr. St. John, the executor, under which such a corporation could be formed.

BRIEF.

The Ohio Act of March, 1902, is not in conflict with the provision of the Constitution of Ohio, which prohibits the conferring of corporate powers by special Act.

Section 1, Article 13, of the Ohio Constitution provides that "The General Assembly shall pass no special Act conferring corporate powers."

The Act of 1902 (R., p. 9) provides that whenever *any person*, by last will, has devised or may devise, etc., property for charitable uses or for the establishment of any industrial or educational school or institution in Ohio, and has or shall provide that the executor organize a corporation to carry out such purposes, and for the management of such institution by a board consisting in part of any State, County or Municipal officials or the Member of Congress of the District, and other persons to be associated with said officials or any of them, they may constitute themserves a body corporate with the general powers of benevolent corporations. It provides that the successors in public office of the public officials shall become their successors, and that the successors of the non-official directors shall be chosen as provided by the will, but if no provision be made, then by the other members of the board.

The Act further provides for the filing with the Secretary of State of the Articles of Incorporation, which shall set forth a copy of the will, the name and location of the corporation.

It empowers the Attorney General to bring proceedings to enforce such bequest, whenever he deems it necessary for the protection of and carrying out the purposes of said will.

On page 9 of its brief in this Court on the motion to dismiss the writ of error, the Smith-

sonian, referring to the decision of the New York Court of Appeals, says:

> "The Court indeed does not assume to deal with the language of the Ohio Constitution, or with the language of any statute of Ohio. * * *
>
> *There is not the slightest intimation in the opinion of Chase, J., that the Court had so much as looked at the Constitution of Ohio."*

On page 10 of the same brief, the Smithsonian says:

> "We use the terms 'the Court reached the conclusion.' *We feel confident that the Court of Appeals, as a matter of fact, did not take into account the inhibition of the Ohio Constitution.* But here we must presume that it did,—and that it applied the Ohio Constitution, with the result just stated."

Judge Chase, in rendering the opinion of the New York Court of Appeals in this case (191 N. Y., 254-269) (R., pp. 50-51), said:

> "* * * The testator's direction to the executor * * * was to procure an incorporation to be formed under the laws of the State of Ohio, without specifying any particular method of procuring such incorporation. He did not direct that it should be chartered by an act of the General Assembly of the State of Ohio. Indeed if he gave the matter any special consideration he must have known that the Constitution of the State of Ohio prohibits the passage of special acts conferring corporate powers (Constitution of Ohio, Art. 13, Sec. 1). * * * * * * *
>
> "Subsequent to the death of the testator and in March, 1902, an act was passed by the General Assembly of the State of Ohio entitled 'An Act to provide for the administration of charitable trusts in certain cases.' If we assume that such act was passed to aid in the incorporation of The Andrews Institute for Girls, it is not necessarily unconstitutional

> for that reason. * * * The fact that such further general statute is passed to aid a particular person for the time being does not make the act a special, as distinguished from a general one. * * * If the act relates to persons, places and things as a class and is neither local nor temporary, the mere fact that its practical effect is special and private does not necessarily prove that it violates constitutional provisions against special legislation. * * *
>
> "The act so passed by the General Assembly of the State of Ohio in 1902 would not seem to be a violation of the Constitution of that State. (*Platt vs. Craig*, 66 Ohio St., 75; *State ex rel. vs. Spellmire*, 67 Ohio St., 77; *Gentsch vs. State ex rel. McGorray*, 71 Ohio St., 151; *Cin. Street R. Co. vs. Horstman*, 72 Ohio St., 93; *State ex rel. Atty. Gen. vs. Sherman*, 22 Ohio St., 411.)"

The Act of 1902 *is a general law of uniform operation, as defined by the courts of last resort of the State of Ohio, by this Court and by the courts of last resort of other States.*

The question, therefore, of the existence of a so-called Federal question to support the jurisdiction of this Court herein, becomes of no importance, because though it have jurisdiction, the Court must affirm the judgment of the Court of Appeals of New York, for want of merit in the criticism that such judgment failed to give faith and credit to the Ohio Constitution. This Court is not concerned with other questions made in that Court.

Waters-Pierce Oil Company vs. Texas, decided by this Court January 18th, 1909, case No. 359, 29 Sup. Ct. Rep., 220:

> Day, J.:
>
> (P. 221) "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error,

but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities, and privileges of Federal origin, specially set up in the state court, and denied by the rulings and judgment of that court."

Before we proceed to discuss whether the Act of 1902 is within the inhibition of the Ohio Constitution, we will take up the suggestion of the Smithsonian that this Act was passed with a desire on the part of the Legislature to have The Andrews Institute incorporated thereunder. While there is no testimony or finding to that effect, let us assume that the Andrews Will suggested the passage of the law in question; that the friends of the proposed Andrews Institute thought such a law essential to the carrying out of the provisions of that will, and that their urgency moved the Legislature to act.

That a law is passed in view of some special occasion or situation which suggests the necessity or desirability of legislation does not affect its character. Doubtless all or nearly all laws originate in that way, some special experience or occurrence demonstrating their necessity, but the character of laws, even though passed to meet the requirements of particular conditions, must be judged by their own provisions and not by the occasion which moved the Legislature to enact them.

Montague, Exr., vs. Maryland, 54 Md., 481;
Matter N. Y. Elevated R. R. Co., 70 N. Y., 327 (351);
Kittinger vs. Buffalo Traction Co., 160 N. Y., 377 (397).

In the first case one Montague persuaded the Legislature of Maryland to amend a law, which

exempted certain relatives from paying inheritance taxes, to include husbands within the exemption, so that he might escape a tax on property left by his wife. The fact was notorious and the law was attacked as special. The Court says:

> (P. 490) "It" (the act) "does not appear to have been passed for his special benefit, and it no more applies to him than it does to all other citizens of the state in *consimili casu*. It may be that the exigencies of this case had something to do with the insertion of this clause in the second section of this Act, but that is a matter which the Courts are not empowered to investigate. We must deal with laws as they appear upon their face and as we find them upon the statute books."

The inquiry in this case must under any circumstances be limited to ascertaining whether the courts of New York have given the Ohio Constitution the same effect as it has "by law and usage at home." (*Chicago & Alton R. R. vs. Wiggins F. Co.*, 119 U. S., 622.) The Smithsonian, while it assails this Act of 1902 as being unconstitutional and reiterates and repeats that it must be unconstitutional, fails to cite any Ohio authorities which sustain its contention. Statements often repeated that the law is clearly special; that it clearly violates the constitutional provision and that the New York Court of Appeals clearly ignored its inhibition, cannot take the place of such exposition of the purpose and meaning of the clause of the Constitution as might, if possible, show the statute to be within its terms.

Definitions of what are general and what special laws within the purview of the Constitution of Ohio and other States, which, in varying form, contain substantially the same provisions, are not wanting.

In *Railroad Co. vs. Cutts, Atty. Gen., et al.*, 94 U. S., 155, this Court quotes approvingly lan-

guage of the Supreme Court of Iowa (20 Iowa, 343) concerning certain laws of that State, as follows:

> "These laws are general and uniform not because they operate upon every person in the State, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation."

This Court, referring to the law under consideration by it, says:

> "This Act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. Whenever a company comes into any class, it has all the 'privileges and immunities' that have been granted by the statute to any other company in that class."

See also *Dow vs. Beidelman*, 125 U. S., 680.

In *State ex rel. vs. Parsons, et al.*, 40 N. J. Law, 123 (quoted with approval by the Supreme Court of Ohio in *Cincinnati Street R. Co. vs. Horstman*, 72 Ohio State, 93, 109), the syllabus is:

> "A law, framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law."

In *Platt vs. Craig*, 66 Ohio State, 75, the Court, on page 78, say:

> "It would seem to be clear, therefore, that a special act as opposed to an act of a general nature is one that is local and temporary in its operation:"

State ex rel. vs. Spellmire, et al., 67 Ohio State, 77.

(P. 83) "The above rules when carried to their full extent and import, prohibit special or local legislation upon a subject matter which is general in its nature and which can be reasonably covered and provided for by a general law having a uniform operation throughout the State. And the best evidence that a subject matter can be covered and provided for by a general law having uniform operation is the fact that such general law has been passed upon that subject matter."

(P. 86) "With us 'uniform operation throughout the State' means universal operation as to territory; it takes in the whole State. And as to persons and things, it means universal operation as to all persons and things in the same condition or category."

Gentsch vs. State, 71 Ohio State, 151, quotes from these cases and says:

(P. 165) "It is apparent from these recent utterances of this Court that the Court has never meant to be understood as denying the general doctrine, held everywhere and often approved here, that a statute in relation to a class, if its operation is not territorially restricted, is a general law. Classification is often proper and sometimes necessary in legislation in order to define the objects on which the law is to take effect and in order to definitely apply and effectuate the purposes of the legislation. * * * In short, there could be very little general legislation without classification."

Cincinnati Street Ry. Co. vs. Horstman, 72 Ohio State, 93, is the latest expression of the Court of last resort of the State of Ohio on this subject.

In that case the statute treating of a subject matter clearly general in its nature restricted the powers granted, to street railroad companies which controlled different lines in the same city *by lease or purchase or by the consolidation of different*

companies into a single company. No other street railroad companies of the State possessed those powers and as the act clearly conferred corporate power it was challenged as violating the Constitutional provisions here under consideration. The trial Court had held that the law conferred corporate powers "not generally but specially according to the particular circumstances of each particular case," and was therefore "a special law conferring corporate power", because the Court said "it excludes from the enjoyment of powers therein granted street railroad companies which have come into the control of lines by original or renewed grants from the municipal corporation itself."

Every one familiar with local conditions knows that the law was suggested by a situation in Cincinnati which it was framed to cover, but being in general terms, so that any one in like situation throughout the State might take advantage of it, the Supreme Court reversed the trial Court and held the act valid.

On page 108 the Court say:

> "But the conferring of corporate powers does not render the act invalid, if it be not a special act. The act operates over the whole territory of the State, and it does not exclude any individual corporation of the class defined. How can the non-inclusion of an individual corporation which is not of the class defined, render the act special in its nature?"

The Court further said that the Legislature sought to accomplish the purpose it had in mind "in general terms by a definite classification which does not contain within itself even a hint of a purely special application."

The Act of 1902 upon its face concerns a sub-

ject matter of general nature, is general in form, is without restriction as to territory, and operates uniformly upon a class defined therein.

By the Act of 1902 the Legislature, prompted, let us say, by the Andrews Will, accomplished the purpose desired "in general terms by a definite classification, which does not contain within itself even a hint of a purely local application."

Since the adoption of the Constitution containing the clause under consideration the Legislature of Ohio has constantly passed laws not affecting every one in the State, but those only of the class defined therein. Such laws have uniformly been held by the courts of that State to be of general and of uniform operation and, when affecting corporations, not unconstitutional as conferring corporate power by special act.

An illustration of that classification is the Act of April 4, 1863 (vol. 60, p. 54, Ohio Laws), which provided that the purchasers of any railroad which *had been* sold under judicial decree might acquire the franchise to be a corporation originally vested in the corporation whose property was sold, upon such terms and conditions as might be agreed upon, and that the grant of the old company in the form of a conveyance of real estate should vest the corporate franchise in the purchasers, who thereupon continued as a reorganized corporation.

This statute was passed to meet an existing condition and the class created thereby contained only persons who had already become purchasers at judicial sale. Probably but one transaction would be affected by it.

This law was sustained in *State vs. Sherman*, 22 Ohio State, 411, which case has never been overruled. On page 429 the Court say:

> "We have no hesitation in holding that the Act of 1863 is not liable to the objection that it is a 'Special Act'. It is a 'General Law' in our judgment, within the meaning of Article 1, Section 2, of the Constitution."

Later this act (R., 23, 24) was amended and the class upon which it operated enlarged to include purchasers at any judicial sale theretofore or thereafter made.

By the second section of the amended act, however, it was provided that before the grant or deed from the old company of its corporate franchise could become effective, it must be filed by the purchasers in the office of the Secretary of State, with the articles of incorporation. This amended act has stood for many years and formed the basis for the corporate existence of many reorganized companies, but no one has ever suspected that because each of such deeds or grants differed from every other, the Act was thereby made special.

The Supreme Court of Ohio has in recent years vigorously condemned certain legislation as in violation of the constitutional prohibition here in question. This legislation has concerned municipalities and the classifications attempted have been so obviously a pretense to evade the Constitution and give one municipality powers which none other could possess, that the Court has looked through the disguise and condemned the laws. It was common, for instance, to make a law apply to all cities having, according to the last Federal Census, a population of say 10,179 or not more than 10,180 or less than 10,178. Reference to the last Federal Census (of which the Court takes judicial notice) would, of course, show but one city of that exact population, nor could there in any human probability ever be another, and the

Legislature might as well have conferred the power upon a city by name. These rulings have no application to legitimate classification.

The subject matter of the Act of 1902 is the incorporation and management of all schools or charitable uses where a testator who, by will, provides for their support, desires that public officials shall have a part in their management.

It is not confined to any particular officer. It is general in its nature and applies to Wills made before the passage of the Act, and to many which will be made in the future by testators who desire their public charities administered by the very men whom the people have entrusted with their important public interests.

It was within the province of the general assembly to pass a law covering that subject matter applicable to all such charitable gifts anywhere and everywhere in Ohio.

As was said by the Supreme Court of Ohio, in *Platt vs. Craig*, 66 Ohio St., 75, supra, such a law it not "local and temporary in its operation", and therefore is constitutional.

The Ohio Legislature, in 1856, passed an Act (53 Ohio Laws, page 33) (R., pp. 21, 22, 23) which provided in substance that where any person should by gift, devise or otherwise, set apart lands, moneys, etc., as an endowment for a school or academy not previously established, and should not provide for the management thereof, the Court of Common Pleas of the proper county should appoint five trustees to have the management thereof, who should be a body corporate with perpetual succession. The act applied by its terms to endowments theretofore as well as those thereafter created. No doubt this law, which has stood

unchallenged for more than fifty years, and under which many institutions have been incorporated, was originally suggested by some gift which had been made without providing any method for the management of the institution.

Obviously, the Act of 1902 makes clear what is implied in the language of the Act of 1856, that where the instrument creating the endowment designates the persons whom the giver desires to act as directors of the corporation to be organized to execute the gift, his wishes may be complied with.

There is nothing in the Constitution or laws of Ohio which prohibits public officials named therein from becoming trustees of such an institution as is covered by these statutes.

Under Section 3733 (R., 25), the Governor fills vacancies in the boards of trustees of any "incorporated college, seminary or academy", where there is no provision of law for filling such vacancy.

The Smithsonian's contention as to the unconstitutionality of the Ohio Act of 1902, is set forth in its brief on the motion to dismiss:

> (P. 3.) "And should the Court hold that such restrictions and limitations became effective because the will had been copied into the articles of incorporation, counsel for the Smithsonian advised the Court that the incorporation would *in that event be illegal and void, because such a construction would render the Andrews Institute a specially incorporated institution.* The Court was cited to the inhibition of the Ohio Constitution against the general assembly conferring corporate powers by special act, being Article XIII, Section 1, of that instrument (R., 26)."

(P.7.) *"This court is already advised of the point raised by us before the Court of Appeals. We argued that the copying of the Andrews will into the articles of incorporation gave no efficacy to the restrictive words of the testator, because to decide that it did give them efficacy was to turn the articles from a general into a special charter."*

(P. 10) "Of course, the ultimate enquiry was—who of the claimants is entitled to the residue? But preliminary questions had to be determined. One of them, and it was fundamental, was—does the Ohio Constitution forbid the restrictive terms of the Andrews will from operating as a part of the charter of the Andrews Institute? This question was asked of the Court, and the Court answered it."

The foundation on which the Smithsonian seeks to build its claim of unconstitutionality is its erroneous "conclusions of law", which appear on pages 26-7 of its brief just filed in this Court:

"When the will says 'the said institution shall contain', etc., the only meaning we can attach to this language is that 'the charter of the said corporation shall provide that the said institution shall contain', etc.

"In like manner, when the will says, 'not exceeding one-tenth of the sum' etc., the real meaning is that 'the charter of the said corporation shall provide that not exceeding one-tenth of the sum', etc."

If it could have found any cases to support these conclusions, which from its point of view are so important and essential, it would have cited them, but it cites none.

As we view the contention of the Smithsonian, it is that the charter of The Andrews Institute is

unconstitutional because it says the corporation is restricted to conducting a school in accordance with the will, and its powers are therefore limited to that purpose.

All corporations are incorporated under general laws for a specific purpose. In fact, the general incorporation laws of every State provide that the specific purposes of the corporation must be set forth in the charter.

If restriction to the specific purpose for which the corporation is formed is violative of the Constitutional provision, then the charter of practically every corporation in the country is void.

If the right given to its organizers of selecting the particular subject matter upon which each corporation shall exercise its powers makes legislation special, there could never be any general laws conferring corporate powers.

The law must be general so that any one can avail himself of it, but the purpose for which the corporation was formed must always be special, and the powers of the corporation are then limited to those special purposes. A corporation formed to operate a dry goods store has no power to operate a coal mine. A corporation formed for the purpose of mining coal has no power to operate a trunk line railroad.

Suppose instead of a copy of Mr. Andrews' will being set forth in the Charter of The Andrews Institute the charter had set forth in apt words the purposes stated in the will as the purposes for which the corporation was organized. Certainly there could have been no objection. It follows that setting forth the will, as the statement of the purposes for which the corporation is formed, can in no way invalidate the charter.

Suppose that a corporation were formed under

Section 3235 of the Statute of Ohio (R., 8, 9), which provides *that "Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves, except for carrying on professional business;"* for the purpose of manufacturing articles under certain Letters Patent of the United States, naming them. The corporation would be restricted to manufacturing under those Letters Patent. Could any one question the "constitutionality" of a corporation formed for that special purpose?

Steam railroads have always had powers quite different from those of street railways, while the powers of urban and interurban street railways are again quite diverse. So Telephone, Telegraph, Express, Insurance, Pipe-Line and many other corporations each have their own peculiar powers. Indeed, the principle of classifying the objects or persons upon which general laws may act has never been disputed in Ohio.

The fallacy in the argument of plaintiff-in-error is easily discovered. It lies in the failure to distinguish between limitations on corporate power and conditions which the donor attaches to his gift as to the manner in which or the purpose for which it is to be used. Counsel fails to differentiate between corporate power within the meaning of the Ohio Constitution and the purposes for which a corporation is organized. The Act of 1902 confers upon every corporation formed under it exactly the same corporate power, to wit: *general power to accept, carry out and execute gifts by will, conditional or unconditional, and to have as its directors the persons named in the will therefor.* The language of the Act is that the persons named therein "may constitute themselves a body corporate with the *general powers of benevolent incorporations.*"

Section 3236 of the Ohio Statutes providing for the formation of corporations provides that the articles of incorporation shall set forth "The purpose for which it is formed." Each "purpose" thus set forth differs from every other, and, in a popular sense, may appear to be a limitation of corporate power. If the corporation desire to engage in other business, it must amend its charter, changing the "purpose" so as to include the new business.

Necessarily, however, the limitation of the "purpose" is not a limitation of corporate power in any exact sense, but merely a voluntary limitation by the parties interested of the things in respect of which they desire those powers to be exercised.

Amending articles of incorporation confers no new or additional corporate powers; it simply enlarges the objects with respect of which those interested desire it to exercise its general powers.

The powers granted The Andrews Institute are the general powers pertaining to benevolent institutions, including power to accept and carry out gifts by will, conditional or unconditional, according to the terms thereof. If the will has become part of its charter, it is only by way of defining the "purpose" for which it is at present organized, and not as a limitation upon its corporate power. If those interested in it at any time desire its scope enlarged, they may, under Ohio Laws, by simple amendment of the articles of incorporation, so enlarge its purposes as to enable it to take other gifts and maintain other schools. Such a process clearly in no wise affects corporate power.

There is no force in the suggestion that, unless the provisions of the will *are* limitations on corporate power, the Institute may expend the money given it otherwise than as desired by Mr. Andrews.

This would equally apply to the conditional gift to the Smithsonian which is given to it "to be devoted to the purposes for which it was established." Though the gift be direct to the corporation, still it is a conditional gift in the nature of a charitable use, the proper execution of which will be enforced by courts of equity.

> *Ould vs. Washington Hospital for Foundlings,* 95 U. S., 303, 24 L. C. Reps., 450-451.

In the *Ould* case, the plaint made by the Smithsonian that The Andrews Institute might educate girls beyond the age fixed by Mr. Andrews, and might not distribute Mr. Andrews' bounty in strict accordance with his will, and therefore its incorporation was void, is fully answered. Not only that, but the absurdity of the Smithsonian's claim that the incorporation of the Andrews Institute is void because Mr. Andrews only desired to educate girls of certain ages, is also shown. In the *Ould* case, the heirs attacked the corporation which had been formed in pursuance to the Testator's will. Among other things, they claimed that the will was void, because it contained "no specification of the foundlings to be provided for", and here the Smithsonian claims it is void because it does contain specifications as to the class of girls to be educated. This Court said:

> (P. 451.) "The objection of uncertainty in this case as to the particular foundlings to be received is without force. The endowment of hospitals for the afflicted and destitute of particular classes, or without any specification of class, is one of the commonest forms of such uses. The hospital being incorporated, nothing beyond its designation as the donee is necessary. Who shall be received, with all other details of management, may well be

committed to those to whom its administration is intrusted. This point is so clear, that discussion or the citation of authorities is unnecessary. Cases illustrating the subject in this view are largely referred to in Perry, Tr., sec. 699, and in the n. to Sec. 1164 Story, Ep. Jur. See also Story Eq. Jur. sec. 1164 and 1190 and notes."

Russell vs. Allen, 107 U. S., 163, 27 L. C. Reps., 397.

The gift, which was assailed was "for the purpose of founding an institution for the education of youth in St. Louis County, Missouri."

GRAY, *J.,*

(P. 399.) "In *McDonogh vs. Murdoch,* 15 How., 367, a citizen of Louisiana, declaring his chief object to be the education of the poor of the Cities of New Orleans and Baltimore, made a devise and bequest to the two cities, one half to each, the income to be applied by boards of managers, who should be appointed by either city, but whose powers and duties he defined, and who should obtain acts of incorporation, if necessary, for the education of the poor and other charitable purposes, in various ways specified. * * * The Court held that the devise to the cities was valid, and that the testator's directions as to the management of the income 'must be regarded as subsidiary to the general objects of his will, and whether legal and practicable, or otherwise, can exert no influence over the question of its validity;'"

(P. 400.) "That the gift is for a charitable use cannot be doubted. All gifts for the promotion of education are charitable in a legal sense."

(P. 401.) "'Schools of learning, free schools and scholars in universities' are among the charities enumerated in the Statute of Elizabeth; and no trusts have been more constantly and uniformly upheld as charitable than those for the establishment or

support of schools and colleges. Perry, Trusts, sec. 700. That the gift 'For the purpose of founding an institution for the education of youth in St. Louis County, Missouri', to be managed by a board of trustees, is sufficiently definite, is shown by the decisions of this Court in *Perin vs. Carey* and *Ould vs. Hospital*, above cited, as well as by that of the House of Lords in *Dundee Magistrates vs. Morris*, 3 Macq., 134."

See also

Jones vs. Habersham, 107 U. S., 174.

By making the will part of the Articles of Incorporation, a permanent and public record of the donor's gift and its conditions is made, so that the Attorney General of the State, as provided in Section 4 of the Act, can see that the gift, which is for the benefit of the public, is properly administered.

Besides all this, the construction placed by plaintiff in error upon paragraph Fifth of the will is exceedingly strained.

It directs that a corporation be formed, "with proper powers" to establish an institution for the free education of girls, etc. The testator describes the kind of an institution he wishes established and the proportions in which the funds provided are to be expended.

The concluding clause of the paragraph reads: "The charter of the said corporation shall *also* provide," if consistent with law, etc., that certain officials, with others, be directors.

The words "also provide" clearly refer to the words "proper powers" in the earlier part of the paragraph, and to nothing else. The corporation could, of course, have "proper powers" to establish the institution without a directorate of the kind suggested, and such directorate is the only

additional suggestion with reference to the charter. There is, therefore, no suggestion or hint in the language of the paragraph that the description of the institution, or the division of the funds donated, were required by the testator to be put into the charter as limitations upon corporate power.

The Act of 1902 is constitutional because,

(a) The subject matter is of general character, to wit, the administration of gifts by will for charitable uses or for establishing schools or institutions. It is a subject matter which the Legislature has again and again dealt with by General Laws which have stood unchallenged for fifty years or more.

(b) It is general in form and entirely unrestricted in territorial operation. It is permanent and not temporary.

(c) It operates equally upon all who come within the class therein defined.

(d) It is available in every part of the State as to all persons and things in the same category.

There is no Federal question in the Record, and this Court, therefore, has no jurisdiction.

Case No. 360, entitled *Waters-Pierce Oil Co. vs. Texas*, decided on January 18th, 1909, Lawyers' Co-Op. Advance Sheets, Feb. 15, 1909, 29 Sup. Ct. Rep., 227, contains the latest statement of this Court upon the nature of its jurisdiction to review judgments of the State courts.

This Court said:

DAY, *J.*,

(P. 229.) "It is well settled in this court that where a state court decides a case upon an independent ground not within the Federal objections taken, and that ground is sufficient to maintain the judgment, this court will not review the case * * * The attempt to assign new errors in the petition for rehearing, which was overruled without an opinion passing on Federal questions, cannot avail."

In support of these statements are cited leading cases in this Court, many of which are referred to in our brief on the motion to dismiss, covering this whole subject, and their result may be briefly summarized.

The right or privilege here claimed is clearly one required by the Judiciary Act to be "specially set up or claimed", i. e., in some way fairly brought to the attention of the State Court for its consideration. The right or privilege thus set up or claimed must have been expressly denied by the State Court or necessarily denied by its judgment. On the other hand, if the judgment was fairly placed or may be sustained upon some ground other than a denial of the claimed right or privilege, there is no Federal question to give this Court jurisdiction.

The Smithsonian did not even intimate that it claimed the protection of the Constitution of the United States or that there was any Federal question in the case, until after the highest Court of New York had rendered its decision.

The claim must be seasonably and specially made and must appear plainly and openly upon the record. It cannot be introduced into the record by stealth or as an afterthought.

Oxley Stave Co. vs. Butler County, 166 U. S., 648.

> (P. 653.) "Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the supreme court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege, or immunity was intended to be asserted. For aught that appears, the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

It rests upon the litigant to make his claim and invoke the consideration of the Court, but "When no such ground has been presented to or considered by the courts of the state, it cannot be said that those courts have disregarded the Constitution of the United States, and this court has no jurisdiction." (*Scudder vs. Coler*. 175 U. S., 32; 36). Any other rule would be unjust to the State Courts.

The above quotations exactly describe the situation in the case at bar.

The Smithsonian's pleadings averred that the Act of 1902 was in violation of the Constitution of Ohio, but did not even suggest that the court's power of construction was limited or constrained by the Federal Constitution.

In the opinions of three Courts through which the case passed, no allusion is made to the Federal Constitution, nor is there a word to suggest that either Court had heard of any claim made under it. The first mention of the subject appears in the motion for re-argument after the final decision, which motion was denied by the Court of Appeals, it finding that "no Federal question having been raised in this court." (R. P. 60.)

(*Disconto Gesellschaft vs. Umbreit*, 208 U. S., 570; *McCorquodale vs. Texas*, 211 U. S., 432.)

Not only is the record otherwise silent upon the subject, but, as just stated, we have the recorded finding of the Court of Appeals that no one had suggested any such question to it.

In the language of Mr. Justice Gray in *Scudder vs. Coler*, 175 U. S., 32; 36.

> "It is impossible, upon this record, to avoid the conclusion that it never occurred to the plaintiff in error to raise a Federal question until after the case had been finally decided against him in the highest court of the state."

Effort is made in the affidavit filed with the motion for re-argument to make it appear that the question was presented earlier. This Court has held in *Zadig vs. Baldwin*, 166 U. S., 485, that Federal questions cannot be established by this process but must appear on the record. It is interesting to note, however, that by inadvertence the language of the affidavit is not quite exact. Speaking of the brief and the oral argument in the Court of Appeals, the affidavit says, "and although it was contended in said brief and on said argument that Article 4, Section 1, of the Constitution of the United States was relied upon." If this is intended to convey the impression that any written or spoken word mentioned in any way the Constitution of the United States or any right claimed under it, the affidavit is misleading. The pleadings and printed brief referred to in the affidavit show that there was no written or printed word and the finding of the Court of Appeals, that there was no spoken word, upon the subject. All that had theretofore been written, spoken or called to the Court's attention was the claim that the law in question was in violation of the Ohio Constitution.

On pages 1-4 of its brief just filed in this Court the Smithsonian recites the various things said and done by it in the State Courts, but there is no mention of any Federal question or right being called to their attention until after the decision of the Court of Appeals.

Osborne vs. Clarke, 204 U. S., 565.

Holmes, J.:

> (P. 569.) "If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States."

It was only after final decision that plaintiff in error thought or spoke of the Constitution of the United States and evolved the theory that invoking the Ohio Constitution, *ipso facto* involved a claim of right under the Federal Constitution to have the Courts of New York give faith and credit to the former.

Upon this theory only can the affidavit be justified, and it is upon this theory that plaintiff-in-error bases the writ of error in this Court.

On this point the Smithsonian, in its brief on the motion to dismiss the writ of error, says:

> (P. 14) "The only consideration that need detain us now is to inquire whether fairly and squarely there was brought to the attention of the Court of Appeals the circumstance that we were relying upon the Ohio Constitution, and were claiming its protection. That we were so doing we submit is a fact that is incapable of denial. * * * "
>
> (P. 15) "Counsel seem to think that it was our duty to pronounce the words 'Federal question', or, 'Constitution of the United States', in the hearing of the Judges, in order to attract their attention."

There is an apparent exception in one class of cases. When one sues on the judgment of the courts of another State he necessarily claims a right which exists only under the Federal Constitution, for the reason that a judgment of one State has no force or effect in another State, save for the provision of the Federal Constitution that judgments of the courts of one State shall be given full faith and credit in another State. It follows, therefore, that when one sets up such a judgment he necessarily claims a right which exists only under the Federal Constitution, and therefore no further words upon the subject are necessary.

Tilt vs. Kelsey, 207 U. S., 43, is an example of this class of cases. In that case this Court, with respect to a judgment of another State, said:

Moody, J.:

> (P. 51.) They 'specially set up and claimed' a right under those proceedings, though it was not in terms stated to be a right claimed under the Constitution. This, in the case of a judgment of the court of another state, has been held to be a sufficient compliance with the statute. *Great Western Teleg. Co. vs. Purdy*, 162 U. S., 329; *Bell vs. Bell*, 181 U. S., 175; *Andrews vs. Andrews*, 188 U. S., 15; and see the remark of the Chief Justice in *Mutual L. Ins. Co. vs. McGrew*, 188 U. S., 291, at page 311."

The case at bar manifestly is not controlled by cases of the class just quoted, which have never enlarged the apparent exception to include anything but the judgments of courts of other States.

The Incorporation of The Andrews Institute was sustainable under other general Statutes of Ohio. It was therefore, not necessary to pass on the constitutionality of the Act of 1902, consequently there is no Federal question involved.

It is not enough, to confer jurisdiction upon this Court, that there was involved a right claimed under the Constitution of the United States, and that the Court decided adversely to that right, if there were other and distinct grounds upon which the judgment of the State Court might fairly be sustained. No judgment involves a Federal question if it can stand on other grounds.

De Saussure vs. Gaillard, 127 U. S.., 216.

Matthews, J.:

(P. 234.) "And it has been repeatedly decided, under section 709 of the Revised Statute that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively not only that a federal question was presented for decision to the highest court of the State, having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *Brown vs. Atwell,* 92 U. S., 327; *Citizens' Bank vs. Board of Liquidation,* 98 U. S., 140; *Chouteau vs. Gibson,* 111 U. S., 200; *Adams County vs. Burlington & M. R. R. Co.,* 112 U. S., 123; *Detroit City R. Co. vs. Guthard,* 114 U. S., 133; *New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.,* 125 U. S., 18."

Stickney vs. Kelsey, Comptroller, 209 U. S., 419.

Moody, J.:

(P. 422) "The best that can be said for

> the plaintiffs in error is that the action of the court was ambiguous. We resolve the ambiguity against the parties complaining, who are bound to show clearly that a Federal right was impaired, rather than misuse our ingenuity to spell out a Federal question to aid a defense which is merely technical and destitute of substantial merit."

The New York courts did not determine that The Andrews Institute was incorporated under the particular Act complained of. The Court of Appeals speaking through Judge Chase (R. 50), said: "Subsequent to the death of the testator and on the 8th day of May, 1902, 'The Andrews Institute for Girls' was incorporated pursuant to the laws of the State of Ohio.'

There were other general statutes of ample breadth to permit the organization of that Institution in precisely the manner in which it was organized, and it was, therefore, not essential to the final judgment of the Court to determine whether the Act complained of violated the Constitution of Ohio.

Mr. Justice Laughlin, in rendering the opinion of the Appellate Division of the Supreme Court of New York (R., p. 42), said:

> "It is quite likely that the corporation could be sustained under other statutes, even if the provisions of the Act of March 19, 1902, with respect to the composition of the board of trustees should be declared invalid. (See Bates An. Ohio Stat., Secs. 3235, 3236, 3238, 3726, 3727, 3734; id., Secs. 4015-67 et seq., p. 2279, Sec. 1 et seq.; 53 O. L., 33, Sec. 1 et seq.). These statutes, among other things, authorize the formation of a corporation for any purpose for which individuals may lawfully join, except for carrying on professional business, and provide for filling vacancies in the board of trustees from any cause, and for the management of schools

or academies receiving bequests and devises by the Court of Common Pleas where the management is not otherwise provided for and for the execution of the trusts upon which the property was bequeathed or devised."

Judge Chase, in rendering the opinion of the Court of Appeals, said (R., 50):

"At the death of the testator the general statutes of Ohio provided that corporations might be formed for any purpose for which individuals might lawfully associate themselves, except for carrying on professional business. (Bates Ann. Ohio Statutes (6th ed.) Vol. 2, p., 1836.)

"Subsequent to the death of the testator and in March, 1902, an act was passed by the General Assembly of the State of Ohio entitled 'An Act to provide for the administration of charitable trusts in certain cases.' If we assume that such act was passed to aid in the incorporation of The Andrews Institute for Girls, it is not necessarily unconstitutional for that reason."

Section 3235, Vol. 2, Bates' Annotated Ohio Statutes (R., pp. 8, 9) quoted above provides that corporations may be formed "for any purpose for which individuals may lawfully associate themselves."

Sec. 3727, Bates' Annotated Statutes of Ohio (p. 2061) (R., pp. 24, 25):

"Any university, college, or academy, or the trustees thereof, may hold in trust any property devised, bequeathed or donated, to such institution, upon any specific trust consistent with the objects of the corporation (50 v. 128, Sec. 5; S. & C., 267)."

The Andrews will provides (R., pp. 6, 7):

"FIFTH: * * * The charter of the said corporation shall also provide, if and so far as may be consistent with law and practicable,

> for the management of the said corporation by a board of five directors, to consist of the Governor for the time being of the State of Ohio," etc., etc.

The make-up of the board is not in the remotest degree made a condition upon which the formation of the corporation is to depend. If such a board as the testator prefers is practicable and can be had consistently with the laws of Ohio, he would like it. If it cannot be had consistently with the laws of Ohio, or if it is not practicable, then the corporation is to be formed and operated without such board.

Sections 4105-67, Sec. 1, page 2279, Bates' Ann. Ohio Statutes (R., pp. 21, 22):

> "Whenever any person shall, by deed, devise, * * * set apart any lands, moneys * * *, as an endowment of a school or academy, not previously established, and shall not provide for the management of such school or academy, the Court of Common Pleas of the proper county shall appoint five trustees," * * * who "shall be a body corporate with perpetual succession," &c.

This statute plainly indicates that the testator may in his will designate by specific or general designation, who shall be the trustees to manage the corporation.

Section 3733 (p. 2061, Bates' Annotated Ohio Statutes (R., p. 25):

> "Whenever there occurs a vacancy, * * * in the board of trustees of an incorporated college, seminary, or academy * * * and there is no provision of law for filling such vacancy, the Governor shall, * * * appoint the required number of trustees."

Assuming that the clause of the Charter of The Andrews Institute which provides who the directors shall be, is void, still, the Charter would stand

and that clause be disregarded as surplusage. The laws of Ohio, above referred to, being amply broad to sustain such an incorporation, Mr. Andrews' will would be fully carried out, for, as already shown he did not make his desire that gentlemen occupying certain offices should be directors a *sine qua non.*

Plaintiff-in-error, however, seeks to show, by certain assumptions and deductions it draws therefrom, that such adverse ruling was necessarily involved in the judgment. The Smithsonian's theories may be stated as follows:

(a) The Andrews Institute was incorporated only by virtue of the Act of March, 1902.

(b) No corporation could be the one described in the Andrews will unless certain directions of the testator as to the use of the property devised were contained in its Charter as limitations upon its corporate powers.

(c) A copy of the Andrews Will was set out in the Articles of Incorporation of The Andrews Institute as required by the act referred to. Being thus set forth, the provisions of the will either became or did not become an integral part of the charter, and limitations upon its corporate powers. The Court of Appeals was obliged to decide one way or the other.

(d) If the Court decided that the provisions of the will were not part of the charter, it must decide that The Andrews Institute could not take because it was not the corporation named in the will.

If, on the other hand, the Court decided that the provisions of the will did become a part of the charter, it must decide that the Act of March, 1902, was a Special Act in violation of the Ohio

Constitution, and, the Act being thus invalidated, that there was no Andrews Institute to take under the will.

(e) The Court did decide that The Andrews Institute was a valid incorporation, was the corporation described in the will, and was entitled to take the gift.

(f) Therefore the Court did decide that the Institute was incorporated and its incorporation could be sustained only under the Act of 1902; that the restrictions of the will were required to be and did become part of its charter and necessarily decided to ignore the Constitution of Ohio.

Manifestly a Federal question never alluded to or hinted at in the record cannot be evolved by such a process to give this Court jurisdiction.

It is impossible to believe that the Court of Appeals agreed with each assumption or deduction involved in this claim.

The Court may not have agreed that the Institution was in fact incorporated under or depended necessarily upon the Act of 1902 for its validity.

The Court may not have agreed with plaintiff-in-error that the will required the restrictions to become a part of the charter. The contention is not supported by the language of the will.

There is no intimation that the Court decided or thought the presence of these restrictions in the Articles of Incorporation was required by the will, or that being there, they constituted any limitation upon corporate power.

It is only on the assumption that the Court agreed with the contention of plaintiff-in-error in both respects that the claim of a Federal question is based. Such assumption is not sufficient for the purpose of conferring the jurisdiction here invoked.

Plaintiff-in-error concedes on page 8 of the Memorandum attached to its brief filed on the motion to dismiss or affirm, "Had the New York Court decided that Mr. Andrews did not require certain limitations and restrictions to be embodied in the charter of the corporation to which he was to give the residue of his estate, that decision, however erroneous in fact, would have shut out any right of the Smithsonian Institution to complain that a Federal question had been ignored." How do we know that the Court did not so decide? The judgment rendered would naturally follow such a decision. A fair construction of the will justifies it and the language of the opinion is not inconsistent with it.

The Court brushed aside the contention of the Smithsonian that these provisions must be limitations on corporate power, as not requiring extended consideration. The Court seems to have considered them of little importance, in view of the fact that the will appeared in the Articles of Incorporation as a matter of public record, and the Attorney General was charged with the duty of compelling observance of the testator's desires.

Certainty that a State Court was called upon to consider and, having an opportunity to consider, did pass upon and deny a claimed Federal right and that its judgment is consistent only with such denial, is wholly lacking here. Such certainty is requisite before this Court takes jurisdiction to review the judgments of State Courts.

The New York Courts recognized the force of the Ohio Constitution and the validity of the Act of 1902, Legitimate questions of the construction of State Constitutions or Statutes are not Federal questions, such as to give this Court jurisdiction to review the judgments of State Courts.

The courts of New York held that if it were necessary to pass upon the Act of 1902, they would construe it to be a general Act, valid under the Constitution of Ohio. They recognized the binding force of the Ohio Constitution. Giving the Constitution of Ohio the interpretation which not only they but the Ohio Courts have deemed correct, they held that the Act of 1902 did not violate it.

Counsel for the Smithsonian, on page 9 of their brief, on the motion to dismiss, say:

> "*There is no question arising here of construction, or of interpretation.* The situation bears no analogy to cases where a State Court has undertaken to construe a statute of another State, out of which procedure a Federal question does not arise under the full faith and credit clause of the Constitution. *Glenn vs. Garth,* 147 U. S., 360, and like decisions, have no application here. In each of that line of cases the State Court actually took up a statute, thus recognizing its existence, and, in consequence, its validity. It applied the statute to the case in hand, or announced a good and sufficient reason why it did not apply it. Such act, it is apparent, constitutes a giving of full faith and credit to the State statute."

This Court has repeatedly held that the legitimate construction or interpretation by a State

Court of the Statute or Constitution of another State, is not reviewable here, regardless of the question as to whether or not this Court might deem that interpretation or construction accurate.

Eastern Building & L. Asso. vs. Williamson, 189 U. S., 122.

Brewer, J.:

(P. 125) "The Federal question presented arises on the contention that the South Carolina courts did not give 'full faith and credit * * * to the public acts, records and judicial proceedings' of the state of New York, * * * * * *

"Courts of one state do not take judicial notice of the laws of another state, whether written or unwritten. They must be proved as facts. * * *

"The law of New York was so proved in this case, and the contention is * * * that the law of New York which entered into and formed a part of the contract sued on was not given by those courts the same force and effect that it had in New York, and that hence the rights secured by the Constitution of the United States to the plaintiff in error were denied. If it appeared that the South Carolina courts, without questioning the validity, simply construed a statute of New York, no Federal question would be presented."

Johnson vs. New York Life Insurance Co., 187 U. S., 491.

(P. 495.) "The supreme court of Iowa did not fail to give due faith and credit to the notice law of New York, since it was fully considered, and the decision of the state courts of New York were called to its attention and cited in its opinion. * * * Whether the supreme court of Iowa was correct in its construction of the applicability of the New York notice statute to this policy was imma-

terial, since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case. The case is covered by that of *Banholzer vs. N. Y. Life Ins. Co.*, 178 U. S., 402, and in principle by *Glenn vs. Garth*, 147 U. S., 360; *Lloyd vs. Matthews*, 155 U. S., 222. To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment. * * *

"The writ of error is dismissed."

Allen vs. Alleghany Company, 196 U. S., 458.

The validity of the incorporation of The Andrews Institute cannot be attacked in this case, quo warranto proceedings not having been instituted and prosecuted to judgment against it by the State of Ohio.

The Andrews Institute was regularly incorporated in Ohio, and is there exercising its corporate franchise (R., 19 and 20). No attack has ever been made on it within that State, nor have any proceedings ever been brought by the State to oust the Institute from the exercise of its corporate franchises or in any manner questioning the validity of its corporate existence.

The State of Ohio has made provision for the method of testing the validity of corporate organization. Section 6760 of the Revised Statutes provides that "a civil action may be brought in the name of the State * * * against an association of persons who act as a corporation within this State without being legally incorporated". Section 6761 provides that like action may be brought against the corporation itself

when it has exercised a franchise, privilege or right in contravention of law. The courts of Ohio do not permit the validity, legality or "constitutionality" of the incorporation of a corporation or its right to exist to be attacked collaterally.

State vs. Gardiner, 54 Ohio State, 24.

Smith vs. Sheely, 79 U. S., 358 (20 L. C. Reps., 430).

(P. 431) Davis, J.:—"It is insisted, however, as an additional ground of objection to this deed, that the bank was not a competent grantee to receive title. It is not denied that the bank was duly organized in pursuance to the provisions of an Act of the Legislature of the Territory of Nebraska, but it is said, it had no right to transact business until the charter creating it was approved by Congress. This is so, and it could not legally exercise its powers until this approval was obtained, but this defect in its constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it."

See also,

Union National Bank vs. Matthews, 98 U. S., 621;

County of Macon, vs. Shores, 97 U. S., 272;

In *Coast Company vs. Spring Lake*, 56 N. J. Equity, 615, on page 620, the Court say:

"After the corporation has been organized its existence can be called in question only by an information in the nature of a writ of quo warranto allowed by permission of the Attorney General."

It is especially true that a corporate franchise granted by one State cannot be annulled or be regarded as void by the courts of another State.

In *U. S. Vinegar Co. vs. Schlegel*, 143 N. Y., 537, the Court say:

> (P. 542.) "But so long as the plaintiff exists and is recognized by the courts and authorities of that state, it is entitled to the same recognition here, unless it appears that it was formed for purposes illegal here, or was doing acts prohibited by the laws of this state to its own citizens and corporations."
>
> *Merrick vs. Van Santvoord*, 34 N. Y., 208; *People ex rel. Sinkler vs. Terry*, 108 N. Y., 1, 7.

The writ of error should therefore be dismissed or the judgment of the Court of Appeals of New York affirmed, because:

First: The Act of March, 1902, is a General Act, in entire harmony with the Constitution, and, if a Federal question was seasonably made, it was therefore correctly decided.

Second: The attempt to raise a Federal question was made too late; and

Third: There is no Federal question in the record.

Respectfully submitted,

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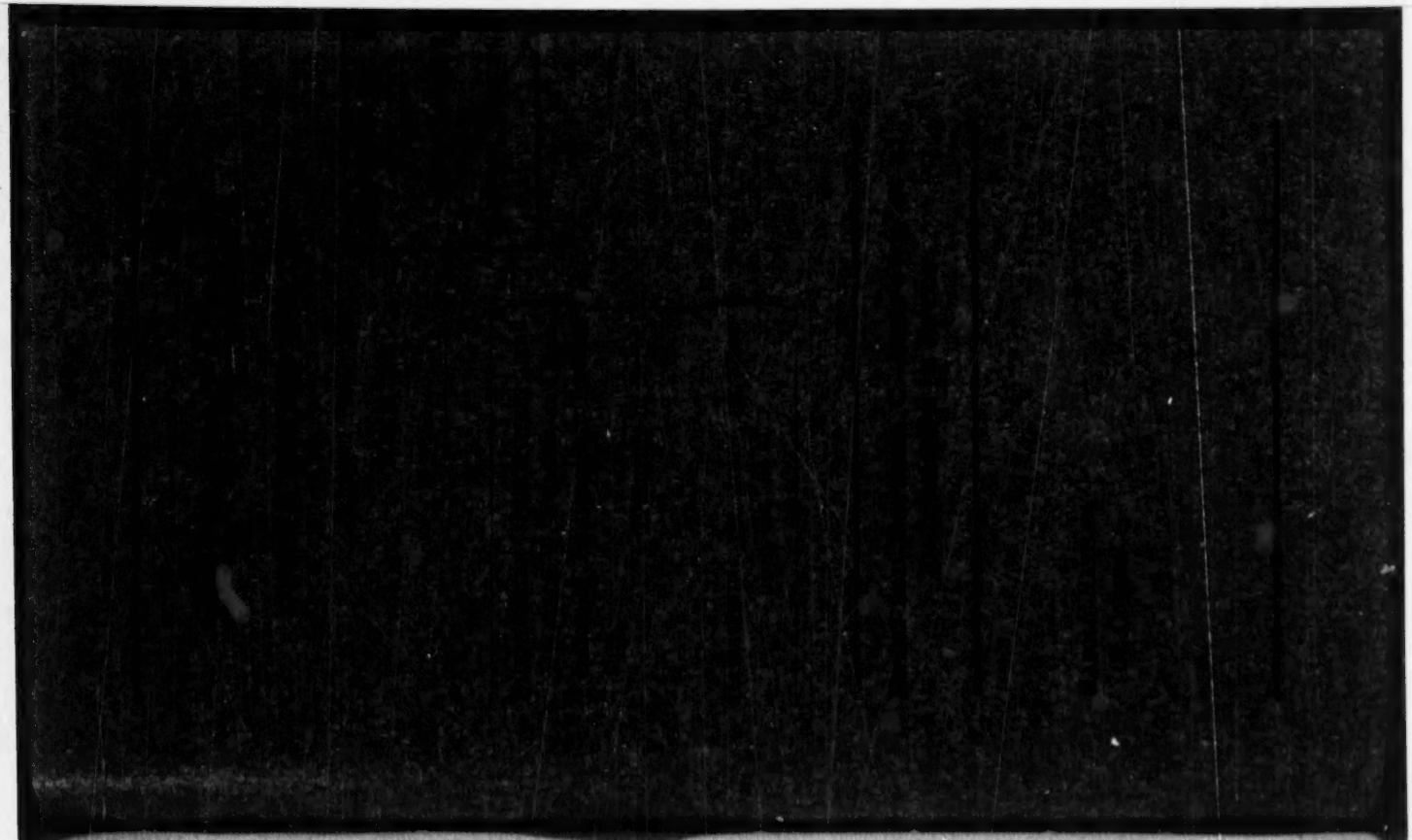
SHELDON H. TOLLES.

Counsel for The Andrews Institute for Girls.



Supreme Court of the United States

OCTOBER TERM, 1908—No. 613.

SMITHSONIAN INSTITUTION and MELVILLE W. FULLER, as Chancellor of Smithsonian Institution,

Plaintiffs-in-Error,

vs.

GAMALIEL C. ST. JOHN, as Executor, etc., et al.

BRIEF FOR NORMAN C. ANDREWS, ET AL., DEFENDANTS-IN-ERROR.

POINTS OF LAW.

I.

This Court has not jurisdiction.

"It is settled law that to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and

that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it."

Eustis vs. Bolles, 150 U. S. 361.

It is also settled law that where the decision below was adverse to the plaintiff in error upon two independent grounds, one of which is not a Federal question, the Supreme Court will dismiss the writ of error.

Missouri Pacific Railway vs. Fitzgerald, 160 U. S. 556.
Seeberger vs. McCormick, 175 U. S. 274.
Berea College vs. Kentucky, 211 U. S. 45.

An inherent vice in the argument of plaintiffs in error is that it assumes that the judgment of the court below upholds the right of the Andrews Institute to take this bequest upon the ground that its competency to take results from its existence by virtue of the act of the Ohio General Assembly, which plaintiffs in error say is a special act conferring corporate powers.

The state court, however, has decided nothing of the sort. What the Trial Court decided was, according to its opinion (Rec. 36), that it is not the province of the courts of New York to question collaterally the credit to be given to the enactment of another state, and that if the Ohio act of 1902 is repugnant to the Ohio Constitution, as claimed, the forum in which to test that question is an Ohio tribunal. Upon that opinion, findings were made and judgment entered. The Appellate Division

and the Court of Appeals are merely courts of review. All that the Appellate Division did was to affirm that judgment. All that the Court of Appeals did was to modify the judgment with respect to certain interim income and affirm the judgment as modified. While this court may examine the opinions of the state courts to ascertain the grounds of its decisions, it must be borne in mind that the opinions of the courts, under the New York practice, are no part of the record; and it is the settled law of New York that the *decisions* of the Court of Appeals are to be found in its *orders* and not in its *opinions* (*Matter of King,* 183 N. Y. 440, 450; *Colonial City Traction Co. vs. Kingston City R. R. Co.,* 154 N. Y., 493, 495; *Stokes vs. Stokes,* 155 N. Y. 581, 594; *Roberson vs. Rochester Co.,* 171 N. Y. 538, 551; *People ex rel. McLaughlin vs. Police Commissioners,* 174 N. Y. 450, 466; *Crane vs. Bennett,* 177 N. Y. 106, 112). The Appellate Division upheld the judgment, so far as the question sought to be brought before this court is concerned, upon a variety of grounds, including a distinct approval of the reasoning of the trial court (Rec. 42). The Court of Appeals upheld the judgment upon several grounds (Rec. 50-51).

In their effort to establish, as they must, that the decision of the supposed Federal question was necessary to the determination of the cause, and that it was actually decided adversely to them, and that the judgment as rendered could not have been given without deciding it and cannot be sustained upon some ground not involving a Federal question, plaintiffs in error argue, substantially:

(a) That testator, by his will, provided for a corporation which was to be formed with certain limitations to be put into its charter, and that a corporation without such charter limitations cannot take the bequest.

(b) That copying the will into the Articles of Incorporation did not make the limitations of the will effective; but

(c) That if the directions contained in the will constitute a part of the charter and limit the general powers conferred, then the charter is a special charter, and the statute authorizing it is in substance and effect a special act conferring corporate powers.

It will be observed at a glance that unless all the links of this argument are sound, the whole argument must fall to the ground. If the directions contained in the will were not intended as charter limitations, that is an end to the argument. That is a question that must first be determined before any Federal question can be presented. It is not a Federal question, and if it was decided or may have been decided by the state court adversely to the plaintiffs in error, this court cannot take jurisdiction.

The opinion of the Trial Court is silent upon this point. It is not made to appear by any findings, requests to find, or exceptions to findings or refusals to find, that any such point was urged before the Trial Court.

There is no indication in the opinion of the Appellate Division that the point was made in that court. There is nothing in the opinion of the Court of Appeals to indicate that that court thought that the testator intended the provisions of his will to be incorporated in the charter of the institution. On the contrary, Chase, J., says: "He did not direct that it should be chartered by an act of the general assembly of the state of Ohio. Indeed, if he gave the matter any special consideration he must have known that the constitution of the state of Ohio prohibits the passage of special acts conferring corporate powers" (Rec. 50).

Where it does not appear upon what ground the highest court of the state proceeded in affirming the judgment, and the case might properly have been determined upon a ground broad enough to support the judgment without resort to a Federal question, this Court has no jurisdiction.

Walter A. Wood Company vs. Skinner, 139 U. S. 293.

When the record discloses completely adequate grounds other than a Federal question, this court does not inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result.

Leathe vs. Thomas, 207 U. S. 93.

If the court below rested its judgment upon principles of common law as it understood them, this court should not take jurisdiction, although the court below, whether rightly or wrongly, also upheld and relied upon the statute.

Arkansas Southern R. R. vs. German Bank, 207 U. S. 270.

II.

The bequest to the corporation is not conditioned or dependent upon any limitations going into its charter.

We understand that counsel for plaintiffs in error do not dispute the general rule, well established in New York, that no matter how particular

a testator may be in his directions as to the manner in which the object of his bounty shall make use of the gift, no matter how he may dictate the manner of its use, no matter though he may stipulate that only the income of the bequest be used, a bequest to a charitable corporation for the purposes for which it is organized, is an absolute gift and creates no trust (*Wetmore vs. Parker,* 52 N. Y., 450; *Bird vs. Merklee,* 144 N. Y., 544; *Matter of Griffin,* 167 N. Y., 71, 83; *Johnston vs. Hughes,* 187 N. Y., 446).

Recognizing the established law, counsel for plaintiffs in error argue that the testator, advised of the futility of attaching conditions to his gift, decided to put these restrictions into the charter of the corporation. But that is merely matter of argument. The testator did *not* expressly require these restrictions to go into the charter; and the courts of New York have not held that such was the intention of testator.

There is not a word in the will about the charter of the proposed corporation until we get to the very last paragraph of the fifth clause, where the testator says, "The charter of the said corporation shall also provide, if and so far as may be consistent with law and practicable, for the management of the said corporation by a board of five directors," etc. (Rec. 7).

Plaintiffs in error argue that the mere use of the word "also" is sufficient to prove that testator intended that all his previous directions should be incorporated in the charter, as organic restrictions. This Court is asked to put a strained and artificial construction upon the language of the will; to say that that construction is the only possible construction, and that it must necessarily be assumed that the state court adopted the same construction; and

then to hold that it follows that the judgment of the state court is necessarily based upon its decision of the supposed Federal question (although the Court of Appeals says no Federal question was raised in that court).

In view of the manner in which the courts strain to uphold rather than to defeat testamentary disposition of property, particularly where the gift is to charitable uses (95 U. S. 313, 107 U. S., 167), it can hardly be necessary to argue at length in opposition to the contention that testator provided for charter restrictions. The will, manifestly, must be construed as though it read "The charter, also, of the said corporation shall provide" etc., or "The charter of the said corporation shall provide, also." The juxtaposition of the word "also" is of no consequence or significance. There is nothing in the will to justify the fundamental contention of plaintiffs in error. The word "also" has often been construed to import no more than, "Item," and to be of the same signification as "moreover" (*Evans and Wife vs. Knorr*, 4 Rawle (Pa.), 66, 68; *Garland vs. Harrison*, 8 Leigh (Va.), 368, 384). It has frequently been held that the word "also" means about the same as "furthermore," and that it does not carry over into the sentence where it occurs the ideas expressed in the preceding sentence; and, *a fortiori*, it does not carry back into the preceding sentence the ideas expressed in the sentence where it occurs (*State vs. Camp Sing*, 32 L. R. A., 635, 639; *Westerman vs. Westerman*, 25 O. St., 500, 509).

Even when the testator does come to speak of the charter of the corporation, he says that it shall provide, etc., "if and so far as may be consistent with law and practicable." Yet plaintiffs in error would have the court hold that the provisions which were to go into the charter only if and so far as

legal and practicable, were of the very essence of the gift, and that without them the gift must fail.

Even if this court should incline to adopt the construction of the will which plaintiffs in error, without demonstration, present as the proper construction, that would not justify the exercise of jurisdiction in this case. Obviously, the state court may have adopted a different construction, and if the directions contained in the will were not intended as charter restrictions or as of the essence of the gift, then no Federal question is presented.

This court cannot correct a supposed error of the state court, which does not involve a Federal question (*Sauer vs. New York*, 206 U. S., 536, 546; and cases, *supra*).

Plaintiffs in error have always contended and still contend that merely copying the will into the articles of incorporation did not make the provisions of the will effective as limitations upon the powers of the corporation; and it cannot be successfully urged that the act of 1902 is a special act conferring corporate powers, if the only objection is that the act permits officials of the State to act *ex officio* as trustees of the corporation, because plainly in that respect the act is general in its nature. *State of Ohio v. Sherman*, 22 O. St., 411; *Railway vs. Horstman*, 72 O. St., 93; *Walker v. Potter*, 18 O. St., 85; *Gentsch v. State*, 71 O. St., 151.

We understand the objection of plaintiffs in error to the Ohio statute to be, that *if* copying the will into the articles of incorporation makes the conditions and restrictions of the will operative as organic limitatons upon the powers of the corporation, then, as every will must be different from every other, the statute in effect permits incorporation under special rather than general acts, con-

trary to the intent of the Constitution. But there is nothing to show that such is, or is intended to be, the effect of copying the will into the charter, and plaintiffs in error do not contend that such is the effect. They say that the Court of Appeals "necessarily" held that such was the effect; but that is not so. Their argument in substance is: "The Court of Appeals must have held that copying the will into the charter made the provisions of the will effective as charter provisions, because if they had not so held, they must have decided that the Andrews Institute is not the corporation intended by the testator, and must have decided in our favor." It seems strange that such an argument should be addressed to this august tribunal.

Counsel for plaintiffs in error are so carried away by their zeal that in the course of their argument, they say of the testator:

> "In distinct and positive terms he requires his executor and executrix to see to it that every one of these provisions in the shape of restrictions upon the powers of the directors goes into the charter."

In view of the real language of the will, this is certainly a remarkable statement. As matter of fact, the testator directs his executor and executrix to procure an incorporation to be formed for the purpose of establishing an institution in the Town of Willoughby, Ohio, for the free education of girls, and for their support in proper cases during education, with a special view to rendering them self-supporting. The testator goes on to say that said institution shall contain certain departments, and that such school shall be open only to girls between the ages of ten and sixteen, and that not exceeding

one-tenth of the bequest may be used for the erection of buildings or for the purchase of premises and the erection of buildings, and the income of the remaining nine-tenths shall be devoted to the support and maintenance of the institution, and then the testator says that the charter of the corporation shall also provide, if and so far as may be consistent with law and practicable, for the management of the corporation by a board of five directors, etc.

Where are the "distinct and positive terms" requiring the executor and executrix to see to it that every one of these provisions in the shape of restrictions upon the powers of the directors shall go into the charter? The language of the testator is not near so strong as the language of other testators which has been held to constitute no restriction whatever upon the absolute character of the gift.

Conditions which impose restraints upon alienation or exact a particular management through specified agents are held to be conditions subsequent, which do not divest the estate if pronounced illegal or impossible. If attached to a devise of real estate the condition is pronounced void; if to a bequest of personalty it is treated as mere recommendation and counsel, not designed to control the will of the donee (*Executors of McDonogh vs. Murdoch*, 15 How. 367, 412; *Wetmore vs. Parker*, 52 N. Y., 450).

Counsel for the plaintiffs in error say that the Court of Appeals has decided that the charter of the Andrews Institute forbids the directors from using more than one-tenth of the bequest in the erection of buildings, and forbids the directors from discontinuing the cooking department, etc., etc.; and base that statement solely upon a single sentence in Judge Chase's opinion, where he mentions

incidentally "the further fact that the will is made a part of the articles of incorporation" (Rec. 51).

It is an extraordinary thing to ask this Court to say that the Court of Appeals held that the provisions of the testator's will are made charter limitations upon the powers of the corporation, simply because of this isolated observation in the opinion of Judge Chase. The affidavit of Mr. Hackett read on the motion for re-argument (Rec. 59) indicates that plaintiffs in error then contended, not that the Court of Appeals had so held, but that the point had been entirely overlooked or misapprehended by that Court. Certainly the Court of Appeals never held and never would hold that the advisory directions in this will were intended to be or have in fact become organic restrictions upon the power and capacity of the corporation.

III.

This Court cannot reach the consideration of the supposed Federal question.

It is to be observed, particularly in Point VIII of the brief of plaintiffs in error, that their counsel argue that the testator intended certain things. They contend that a certain construction is the natural, and they say indeed the only construction to be given to the wording of the provisions of the will. They refer to the age of the testator and the age of his wife and other extraneous matters. They pick out different words in the will, all in an effort to have the Court put a certain construction upon the language of the will, which construction, as we think, is highly artificial and quite impossible. They

ask this Court to adopt that construction, and either to say that the Court of Appeals was wrong in not adopting that construction, or to say that the Court of Appeals necessarily must have adopted that construction; and all this for the purpose of leading up to what they claim to be the Federal question in this case.

It is perfectly obvious that the Court will never arrive at the consideration of the Federal question, for the plaintiffs in error will never succeed in making it appear, contrary to the fact, that the Courts of New York did construe the will in the manner for which the plaintiffs in error contend. The fact is that the directions of the testator with respect to the Ohio corporation were not to be limitations contained in the charter. They are merely such directions as we find in almost every will of this character—directions which express the wishes and intent of the donor, but which in no wise restrict the power and capacity of the beneficiary to become vested with the absolute ownership of the gift.

The Andrews Institute was found by the courts of New York to be duly incorporated under the laws of the State of Ohio, and to be the corporation which the testator intended as his residuary legatee. No Federal question is involved in that decision. The courts of New York went further, and, construing the statutes of Ohio and the Constitution of Ohio, and confirming an independent construction by reference to the decisions of the highest court of Ohio, held that the Andrews Institute had a legal existence and had capacity to take this bequest; and we submit that no Federal question is involved in that decision, and that no right guaranteed to the Smithsonian Institution by the Constitution of the United States has been denied by the decision of the courts of New York.

In this connection we respectfully invite the attention of this court to the fact that under the authority of its own decisions, if this case had originated in the United States Circuit Court, the same decision would have been rendered upholding the gift to the Andrews Institute (*Perin v. Carey*, 24 How, 465; *Russell v. Allen*, 107 U. S. 163; *Jones v. Habersham*, 107 U. S. 174; *Ould v. Washington Hospital*, 95 U. S. 303; *Hayes vs. Pratt*, 147 U. S. 557, 567).

IV.

No Federal question is involved in the case.

Counsel for the plaintiffs in error say that the learned Judge who delivers the opinion of the Court of Appeals devotes no little space to the title and terms of the act of the Ohio General Assembly of March 19th, 1902, as well as to a defence of its constitutionality. This seems to amount to a concession that the Court of Appeals did consider and uphold the constitutionality of this act, although plaintiffs in error first complain (Brief 5) that the Court of Appeals ignored the Ohio Constitution. As we have argued in our brief on the motion to dismiss or affirm, it cannot be possible that where the courts of one State give faith and credit to a statute of another State, it can be said that a Federal question is involved, upon the ground that the statute of the foreign State is in conflict with the Constitution of the foreign State. Whether a State statute is or is not in conflict with the State Constitution is not a Federal question; and where the courts of another State, upon a construction of the statute and of the Constitution, uphold the statute as constitutional, no Federal question is involved.

Indeed, we submit that the orderly administration of justice requires that the statutes of a State, duly enacted, be deemed valid in the courts of every other State unless declared unconstitutional and void by a court of competent jurisdiction of the State in which the statute was enacted. It is doubtful whether any one but the State of Ohio can question the legal existence of the Andrews Institute (*Vidal vs. Girard's Executors*, 2 How. 127, 191).

We submit that the courts of New York were wholly without jurisdiction to disregard and treat as null a statute enacted by the legislature of the State of Ohio. For this reason, as well as for the reasons stated in our brief on the motion to dismiss, we submit that there is no Federal question before this Court.

V.

The Smithsonian Institution is not in any event presently entitled to the bequest. The gift to the Ohio corporation created a valid contingent estate, and if for any reason the Andrews Institute cannot take, then the executor must proceed under the will to procure a proper corporation to be formed.

If for any reason this Court should be of the opinion that the decision of the Court below is erroneous, then we respectfully submit that this Court cannot, as asked by the plaintiffs in error, direct judgment in favor of the Smithsonian Institution; it can only remand the case with instructions to proceed. This Court cannot, because of its power to pass upon the Federal ques-

tion, go further, and, quite outside of its jurisdiction, say that the intention of the testator has failed or that his intention has become impossible of realization. Those are questions to be determined by the state courts. We say that the intention of the testator has not failed and has not become impossible of realization, and that, so long as Mr. St. John lives, there is, under the statutes and law of the State of New York, a valid contingent estate in favor of this corporation to be brought into being (Rec., 48-49). The gift *does not take effect* until the corporation is formed (Rec. 55; see *Inglis vs. Sailors' Snug Harbor*, 3 Pet., 99, 115). This Court is without jurisdiction to say that such a corporation cannot be procured, and that therefore the contingent estate can never become a vested estate. It is our contention that if for any reason the Andrews Institute is not competent to take this bequest presently, then, agreeably to the directions of the testator, a corporation must be formed under the laws of Ohio for the purpose of receiving the gift, and the only effect of the delay will be to increase the amount of the income accruing between the time of the death of the testator and the formation of such corporation, which interim income, as the Court of Appeals has held, belongs to the next of kin.

Counsel for the plaintiffs in error argue that the testator intended that the experiment should be tried of obtaining such a charter for the institution as his language denotes, and that he in effect provided that if the charter obtained for such an institution should be the subject of examination in the courts and should be held invalid for any reason, then his estate should go to the Smithsonian Institution.

There is nothing in the will which justifies any

such contention. Counsel for the plaintiffs in error ask this Court not to construe, but to re-write the testator's will.

In no event has the scheme of the testator because of illegality failed or become impossible of realization. If the Andrews Institute for Girls is not competent to take the gift, it remains the duty of the executor to form a corporation that will be competent to take it, and the general laws of the State of Ohio are comprehensive enough to permit such incorporation. Indeed, for aught this Court can say, the general laws of Ohio may be amended, or new general laws may be adopted, or even the Constitution of the state may be amended. No Court can say just when it may be "practicable" to form this corporation, if it has not already been formed. Counsel for the plaintiffs in error say that Mr. Andrews did not intend that his executors should conduct a series of experiments. The intention of Mr. Andrews is to be sought solely in his last will and testament. What he there says, is: "I direct my executor and executrix as soon as practicable after my decease and during the lives of my said wife and her said brother or the life of the longest liver of them, to procure under the laws of the State of Ohio an incorporation to be formed." If the Andrews Institute has not been lawfully incorporated, then the efforts of the executor have been thus far unavailing. But the duty and the trust remain.

The testator has created a future estate, which is to take effect upon the lawful formation of the corporation contemplated by him. Until *that* corporation is formed, the title to the property remains in abeyance (*Ould vs. Washington Hospital*, 95 U. S. 303, 313.) No precedent estate is required by the law of New York to support this future estate. So long as the future estate is limited to vest within

the statutory period of two lives in being, it is a valid contingent estate. Only the death of Mr. St. John can put an end to the contingent estate created by this will.

VI.

It is respectfully submitted that the writ of error should be dismissed, or that the judgment should be affirmed.

HAROLD NATHAN,
For Norman C. Andrews, et al.,
Defendants in Error.